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Supreme Court, U.S.
FILED

No. 101330

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In the

Supreme Court of the United States

KENNEDY JONES,

Petitioner,

v.

THE UNITED STATES OF AMERICA;
RAY LaHOOD, Secretary, Department of Transportation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 26, 2011

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QUESTION PRESENTED

Do district courts have jurisdiction to consider federal employee Title VII claims involving Federal Aviation Act orders which deal with aviation safety?

PARTIES TO THE PROCEEDING

The caption names all of the parties to the proceedings. Petitioner Kennedy Jones was the plaintiff in the district court. Respondents Ray LaHood and United States of America were the defendants. In the court of appeals, Jones was the appellant, and Respondents were the appellees.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION ... 4

I. The Circuits Are Divided Whether District Courts Have Jurisdiction to Consider Federal Civil-Rights Discrimination Claims Involving FAA Orders. 4

A. Overview of the jurisdictional principles at issue. 4

B. The Second Circuit and D.C. Circuit have held that jurisdiction exists. 6

C. In conflict with other circuits, the Fifth Circuit has held that jurisdiction does not exist. 7

II. The Fifth Circuit's Approach Undercuts the Federal Statutory Scheme. 8

A. The Second and D.C. Circuits are correct that district court jurisdiction exists, consistent with the statutory scheme. 8

1. Statutory text and structure show that jurisdiction exists for these claims. 8

2. The purpose of the statutes requires that jurisdiction exists in the district court. . 11

3. The legislative history further suggests that jurisdiction exists in the district courts. 11

4. Preclusion of district court jurisdiction denies meaningful review of discrimination claims. 12

B. The Fifth Circuit's decision below violates these principles. 14

III. This Is An Important, Recurring Federal Question. 17

CONCLUSION 18

APPENDIX

Appendix A: Opinion and Judgment, U.S. Court of Appeals for the Fifth Circuit (November 3, 2010) 1a

Appendix B: Memorandum Opinion and Order and Final Judgment, U.S. District Court, N.D. Texas (October 27, 2009) 8a

Appendix C: Denial of Petition for Rehearing, U.S. Court of Appeals for the Fifth Circuit (January 26, 2011) 21a

Appendix D: 42 U.S.C. § 2000e-5 . . . . . 23a
42 U.S.C. § 2000e-16 . . . . . 34a
49 U.S.C. § 40120 . . . . . 38a
49 U.S.C. § 46110 . . . . . 39a

Appendix E: Plaintiff's Original Complaint, U.S. District Court, N.D. Texas (October 23, 2008) 41a

TABLE OF AUTHORITIES

Cases

14 Penn Plaza L.L.C. v. Pyett,
129 S. Ct. 1456 (2009) 12

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 9

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 16

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 11, 16

Am. Tobacco Co. v. Patterson,
456 U.S. 63 (1982) 17

Armstrong v. Turner Indus.,
141 F.3d 554 (5th Cir. La. 1998) 16

Battle v. Fed. Aviation Admin.,
393 F.3d 1330 (D.C. Cir 2005) 6

Bd. of Governors of The Fed. Reserve Sys. of the United States v. MCorp. Fin., Inc.,
502 U.S. 32 (1991) 5, 14

Biens v. United States of America,
695 F.2d 591 (D.C. Cir. 1982) 6

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 15

Block v. Comm. Nutrition Inst.,
467 U.S. 340 (1984) 5, 14

Breen v. Peters,
474 F. Supp. 2d 1 (D.D.C. 2007) 6

Brown v. GSA,
425 U.S. 820 (1976) 5, 8, 14

Buethe v. Britt Airlines, Inc.,
581 F. Supp. 200 (S.D. 1984), *reversed on other grounds*, 749 F.2d 1235 (7th Cir. 1984) 11

Chandler v. Roudebush,
425 U.S. 840 (1976) 4, 11, 14

City of Alameda v. Fed. Aviation Admin.,
285 F.3d 1143 (9th Cir. 2002), *cert. denied* 535 U.S. 1008 (2003) 10

City of Tacoma v. Taxpayers of Tacoma,
357 U.S. 320 (1958) 5, 14

Cook v. Pan Am. World Airways, Inc.,
771 F.2d 635 (2d Cir. 1985) 7

Harm v. Internal Revenue Serv.,
321 F.3d 1001 (10th Cir. 2010) 9

Ligon v. LaHood,
614 F.3d 150 (5th Cir. 2010) 7, 14, 15, 17

McNary v. Haitian Refugee Ctr., Inc.,
498 U.S. 479 (1991) 10

Merritt v. Shuttle, Inc.,
245 F.3d 182 (2d Cir. 2001) 6, 7, 17

Morton v. Mancari,
417 U.S. 535 (1974) 14

Smith v. The Office of Personnel Mgmt.,
778 F.2d 258 (5th Cir. 1985) 17

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) ..... *passim*

Traynor v. Turnage,
485 U.S. 535 (1988) 5, 11, 14

Statutes

28 U.S.C. § 1254 1
28 U.S.C. § 1331 1
28 U.S.C. § 2101(c) 1
29 U.S.C. § 633a 15
42 U.S.C. § 1291 1
42 U.S.C. § 1981 ..... 3, 13, 16
42 U.S.C. § 1981a 16, 17
42 U.S.C. § 1981a(c) 8
42 U.S.C. § 2000e 3
42 U.S.C. § 2000e-2(m). 17
42 U.S.C. § 2000e-5 ..... 8, 10, 16
42 U.S.C. § 2000e-5(f) 8, 9
42 U.S.C. § 2000e-5(f)(3) 1, 4
42 U.S.C. § 2000e-16 ..... *passim*
42 U.S.C. § 2000e-16(b) 9
42 U.S.C. § 2000e-16(c) 8
42 U.S.C. § 2000e-16(d) 8
49 U.S.C. § 40120 ..... 1, 13
49 U.S.C. § 40120(b) 9

49 U.S.C. § 40122(g)(2)(H) 9
49 U.S.C. § 44701(a)(2) 10
49 U.S.C. § 44702(d) 10
49 U.S.C. § 46110 ..... *passim*
49 U.S.C. § 46110(c) 13
49 U.S.C. § 47101(a) 11
49 U.S.C. § 47101(d)(1)-(2) 11

Civil Aeronautics Act of 1938 (Pub. L. No. 75-706, § 609, 52 Sta. 973 (1938) 12

Section 1006 12

Interstate Commerce Act of 1887, Ch. 104 § 16, 24 Stat. 379 (1887) 12

Rules

Sup. Ct. R. 13.1 1

Sup. Ct. R. 13.3 1

Other

S. Rep. No. 85-1811, 85th Cong. 2nd Sess. 1 (1958) . 12

OPINIONS BELOW

The decision of the U.S. Court of Appeals, Fifth Circuit, dated 11/3/2010, reported at 625 F.3d 827, affirming the District Court's decision, is reproduced in Pet. App. A

The judgment of the U.S. District Court, Northern District of Texas, Fort Worth Division, dated 10/27/99, reported at 667 F. Supp. 2d 714, dismissing plaintiff's complaint, is reproduced in Pet. App. B.

JURISDICTION

The Fifth Circuit denied petitioner's timely filed petition for panel rehearing on 1/26/2011. Pet. App. C. This petition was timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it was filed within 90 days of the date of the denial of rehearing. This Court has jurisdiction to review the circuit court's decision under 28 U.S.C. § 1254. The district court had jurisdiction under 28 U.S.C. § 1331 via 42 U.S.C. § 2000e-5(f)(3) and 42 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The statutes involved are 42 U.S.C. §§ 2000e-5(f)(3), 2000e-16 ("Title VII") (Pet. App. 23a, 34a); and 49 U.S.C. §§ 40120, 46110 (Pet. App. 38a, 39a) ("Aviation Act").

STATEMENT OF THE CASE

This case involves a basic question that has divided the circuits: Do district courts have jurisdiction to hear

Title VII suits involving FAA orders? Even the Respondents in this case agreed that such jurisdiction exists. Yet, because the Fifth Circuit has concluded—contrary to other circuits—that there is no jurisdiction, Kennedy Jones' Title VII claims have never been heard in federal court.

Jones began working as an aerospace engineer for the FAA in 2001. After a number of years, he filed with the EEOC race-discrimination complaints against the FAA. To resolve these complaints, the FAA entered a settlement agreement with Jones. In addition to providing for monetary payment, the agreement required the FAA to remove all disciplinary documentation from his personnel file. The agreement also had a confidentiality provision, requiring that the FAA not share the agreement or discrimination complaints with anyone not directly involved in it. Relying on the agreement, Jones then voluntarily resigned as an FAA engineer in 2007.

Meanwhile, Jones had applied to the same FAA office to be appointed as a private, Designated Engineering Representative ("DER"). This DER certification would enable Jones to work as an independent contractor performing certain examinations, tests and inspections of private-industry helicopters for FAA airworthiness compliance. If appointed, Jones would be the first black person to be appointed as a DER in the FAA's Southwest region.

But he never got that chance. Instead, his former supervisor, Charles Harrison (who was involved in the discrimination complaints), refused to submit the application for review, contrary to FAA procedures. Relying on information in Jones' personnel file that

was to have been expunged under the settlement agreement, Harrison denied the application. Jones internally appealed, but the appellate panel summarily affirmed Harrison's decision. Jones then filed an EEOC discrimination and retaliation complaint. Pet. App. 61a–69a. The FAA denied his complaint but advised him of his right to file suit in U.S. District Court. Pet. App. 53a-54a.

Jones then filed this suit against the FAA in district court raising discrimination and retaliation claims under Title VII (42 U.S.C. § 2000e) and 42 U.S.C. § 1981. Pet. App. 41a. The district court concluded that it lacked jurisdiction under 49 U.S.C. § 46110 because the suit involved an FAA order. Under § 46110 of the Federal Aviation Act, district courts lack jurisdiction to consider challenges to FAA orders "with respect to aviation duties and powers designated to be carried out" by the FAA Administrator. Pet. App. 39a. Such challenges are exclusively made in the D.C. Circuit or directly in the court of appeals where the person resides or has its principal place of business. *Id.*

On appeal to the Fifth Circuit, the Respondents agreed with Jones that the district court was wrong to conclude that it lacked jurisdiction; the Respondents contended that the Fifth Circuit should affirm on other grounds. Yet, the Fifth Circuit agreed with the district court, concluding that no jurisdiction existed in the district court. When quoting the relevant section of § 46110, the court omitted reference to the statute's provision for exclusive jurisdiction as limited to those orders "with respect to aviation duties and powers . . . ." Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

The circuits are split on a basic question of jurisdiction: Is a federal employee's right to district court jurisdiction for a Title VII claim eliminated when an FAA aviation safety order is involved?

The Fifth Circuit's decision here marks a sharp departure from the Second and D.C. Circuit's approach. Indeed, even the FAA argued that jurisdiction existed.

Under the Fifth Circuit's approach, the FAA's review process—designed only for aviation safety issues—may now adjudicate employment discrimination or retaliation claims without any Congressional authority or any expertise to do so and without any power to grant the relief provided by Title VII. This approach threatens to dismantle the comprehensive scheme carefully created under 42 U.S.C. §§ 2000e-16, 2000e-5(f) to adjudicate these kinds of claims for federal employees. Certiorari should be granted.

I. The Circuits Are Divided Whether District Courts Have Jurisdiction to Consider Federal Civil-Rights Discrimination Claims Involving FAA Orders.

A. Overview of the jurisdictional principles at issue.

Federal employees are entitled to trial de novo of Title VII employment discrimination claims in district court just as are private-sector employees. *Chandler v. Roudebush*, 425 U.S. 840, 846, 848 (1976). Indeed,

this right provided in 42 U.S.C. § 2000e-16 creates the exclusive and preemptive administrative and judicial remedy for claims of employment discrimination in federal employment. *Brown v. GSA*, 425 U.S. 820, 835 (1976). It is the only statutory channel providing for redress of these Title VII claims.

There is a strong presumption in favor of traditional judicial review of agency actions; only a showing of clear and convincing evidence of a contrary legislative intent will overcome that presumption. *See Traynor v. Turnage*, 485 U.S. 535, 542 (1988). In making such determination, the Court examines the express language, statutory scheme, purpose, legislative history of the statute in question and nature of the agency action. *Block v. Comm. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Equally importantly, the Court will consider if the statute in question will deprive the claimant of any meaningful and adequate means to vindicate statutory rights as conferred by other law. *Bd. of Governors of The Federal Reserve Sys. of the United States v. MCorp. Fin., Inc.*, 502 U.S. 32, 43 (1991). To preclude district court review, the statute must afford the claim otherwise "meaningful review." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). An important test is whether the claim "could and should have been" litigated before and decided by a court of appeals. *Cf. City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958). In other words, the agency must have the authority to hear and decide the particular issue in question.

B. The Second Circuit and D.C. Circuit have held that jurisdiction exists.

The Second and D.C. Circuits have followed these principles and concluded that district court jurisdiction to consider statutory federal employee civil-rights claims involving FAA aviation safety orders remains intact despite 49 U.S.C. § 46110.

For example, in *Battle v. Federal Aviation Administration*, 393 F.3d 1330 (D.C. Cir 2005), the D.C. Circuit held that reinstatement and back-pay claims for race and disability discrimination claims—including those under Title VII—are not the kinds of claims that invoke the exclusive-jurisdiction provision of § 46110. The court recognized that the plain language in § 46110 limits the courts of appeals' exclusive jurisdiction to orders dealing with "aviation duties and powers." *Id.* at 1335; *see also Biens v. United States of America*, 695 F.2d 591, 597-98 (D.C. Cir. 1982) (holding that precursor to § 46110(a) does not preclude district court's jurisdiction over a pilot's negligence suit against FAA under the Federal Tort Claims Act); *Breen v. Peters*, 474 F. Supp. 2d 1 (D.D.C. 2007) (holding that jurisdiction exists to hear ADEA discrimination claims by air-traffic controllers based on FAA order that outsources their jobs)

Similarly, in *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 188 (2d Cir. 2001) ("*Merritt II*"), the Second Circuit held that district-court jurisdiction existed over a pilot's negligence suit against FAA under the Federal Tort Claims Act even though the pilot could have appealed the disputed order under 49 U.S.C. § 46110. As the court explained, the "mere overlap of evidence, testimony or findings between the agency and district

court is insufficient to preclude the district court from hearing the claim." *Merritt,*, 245 F.3d at 189; *see also Cook v. Pan Am. World Airways, Inc.*, 771 F.2d 635, 639-644 (2d Cir. 1985) (relying on the ADEA's statutory grant of *de novo* review to conclude that the precursor to § 46110 does not bar district court jurisdiction).

C. In conflict with other circuits, the Fifth Circuit has held that jurisdiction does not exist.

The Fifth Circuit has reached the opposite conclusion– that no jurisdiction exists in the district court when the plaintiff's claim involves an FAA aviation order. The Fifth Circuit had previously reached that determination in a case involving the ADEA. *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010). That decision—which is currently at issue in a pending petition for certiorari—was the foundation for the Fifth Circuit to reject Jones' claims here. Pet. App. 3a ("In *Ligon*, we addressed an indistinguishable situation and found that there was no subject-matter jurisdiction under § 46110(a)."). Pet. App. 3a. As discussed below, the Fifth Circuit's approach is contrary to the Congressional scheme for federal jurisdiction under various statutes, including Title VII.

II. The Fifth Circuit's Approach Undercuts the Federal Statutory Scheme.

A. The Second and D.C. Circuits are correct that district court jurisdiction exists, consistent with the statutory scheme.

1. Statutory text and structure show that jurisdiction exists for these claims.

It is well-settled that 42 U.S.C. § 2000e-16 establishes the "exclusive judicial remedy for claims of discrimination in federal employment." *Brown*, 425 U.S. at 835. Therein, Congress granted district courts the exclusive right to consider discrimination claims of federal employees. 42 U.S.C. §§ 2000e-16(c) and (d), 2000e-5(f). Under Title VII, a detailed and comprehensive administrative and judicial review system already exists to handle Jones' discrimination and retaliation claims ("EEO process"). The separate review procedures in § 46110 do not displace this Title VII system.

Moreover, 42 U.S.C. § 1981a(c) provides that a party seeking compensatory or punitive damages under Title VII may demand trial by jury, further indicating a right of district court review.

In contrast, the Aviation Act has no scheme to deal with Title VII discriminatory or retaliatory claims for federal employees. Instead, such remedial review is housed only in 42 U.S.C. §§ 2000e-16 and 2000e-5. Therein, the Equal Employment Opportunity Commission ("EEOC") is charged with the authority to enforce Title VII for federal employees through appropriate remedies, including reinstatement, back

pay and other relief. *Id.* at 2000e-16(b).[1] This is an exclusive delegation of authority to the EEOC and the various complaint paths that lead to the EEOC. Congress does not delegate such enforcement to the FAA under § 46110.

This Title VII system allows aggrieved federal employees to pursue discrimination and retaliation claims through complementary channels, each invariably leading to the right to litigate in district court. *Cf. Harm v. Internal Revenue Serv.*, 321 F.3d 1001, 1005 (10th Cir. 2010) There is no jurisdictional exception carved out of 42 U.S.C. §§ 2000e-16 or 2000e-5(f) just because an administrative order is involved which can be appealed through a different review mechanism on other grounds.

§ 46110's review path does not preempt Title VII's exclusive forums. In fact, the text of the Aviation Act preserves district court review of mixed case discrimination complaints under its personnel management system. *See* 49 U.S.C. § 40122(g)(2)(H).

The text of the Aviation Act also contains a broad savings clause: "Additional remedies. A remedy under this part [49 U.S.C. § 40101 et seq.] is in addition to any other remedies provided by law." 49 U.S.C. § 40120(b). As such, Congress makes clear that direct appeal to the circuit courts is not the exclusive remedy available. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 144-46 (1967) (similar savings clause shows intent not to eliminate traditional judicial review of other kinds

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[1] Original Title VII enforcement by Civil Service Commission was transferred to EEOC in 1978.

of agency actions). The Fifth Circuit's approach nullifies this statutory language. Instead, § 46110 should be read in harmony with the savings clause and with 42 U.S.C. §§ 2000e-16 and 2000e-5, which command that other actions of the FAA, such as Title VII discriminatory or retaliatory conduct, are heard in district courts.

The structure of the Aviation Act clearly shows a scheme that § 46110 deal only with air safety, not employment discrimination. Both § 46110 and the FAA order in the instant case are found under Part A in the act, which deals only with aviation safety. *See* 49 U.S.C. § 44701(a)(2) and § 44702(d). Nowhere in Part A is FAA vested with responsibility over civil rights violations or employee discrimination. The Ninth Circuit recognizes § 46110's restricted scope of review in *City of Alameda v. Federal Aviation Admin.*, 285 F.3d 1143, 1144-45 (9th Cir. 2002), *cert. denied* 535 U.S. 1008 (2003) (holding that district court has jurisdiction over FAA order which had nothing to do with aviation safety). 285 F.3d at 1144-45.

Moreover, employment discrimination claims are simply not the type of claims that Congress intended to be reviewed under the structure of § 46110. *Cf. Thunder Basin Coal Co.*, 510 U.S. at 212; *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991). Only a narrow class of agency actions is covered within § 46110, namely aviation safety orders. It does not include Title VII retaliatory conduct of the agency.

Finally, nowhere within § 46110 does the FAA have any special expertise in the processing, investigating, reviewing or determining employment discrimination claims. It is simply outside of FAA's expertise. *See*

Thunder Basin Coal Co., 510 U.S. at 212; *Traynor*, 485 U.S. at 544. Rather, it is well known that such expertise lies with the EEOC and EEO offices.

2. The purpose of the statutes requires that jurisdiction exists in the district court.

The purpose of Title VII is to prohibit and remedy employment discrimination. The purpose and policy of the Aviation Act is for "safe operation of the airport and airway system" 49 U.S.C. § 47101(a), (d)(1)-(2). *See also Buethe v. Britt Airlines, Inc.*, 581 F. Supp. 200, 201 (S.D. 1984), *reversed on other grounds*, 749 F.2d 1235 (7th Cir. 1984). That is it. It has nothing to do with civil rights or employment discrimination or retaliation.

3. The legislative history further suggests that jurisdiction exists in the district courts.

This Court extensively examines the legislative history of the 1972 amendment to Title VII in *Chandler*, 425 U.S. at 848-61, observing that facing "a choice between record review of agency action based on traditional appellate standards and trial *de novo* of Title VII claims," Congress ultimately "selected trial de novo as the proper means for resolving the claims of federal employees." *Id.* at 861. Furthermore, this history shows congressional intent to "allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Co.*, 415 U.S.

36, 48 (1974)[2] The Aviation Act does not supplant this right.

On the other hand, the legislative history of § 46110 demonstrates that it was never intended to displace remedies provided by other laws. Its history shows the complete absence of any discussion or intent to cover or remedy employee discrimination. Indeed, the Aviation Act is imbued with this purpose to promote aviation safety as enunciated in the Senate report accompanying S. 3880 which Congress enacted to create the FAA: "to provide for the safe and efficient use of the airspace ..." S. Rep. No. 85-1811, 85th Cong. 2nd Sess. 1 (1958). Moreover, the origins of § 46110 are traced to Section 1006 of the Civil Aeronautics Act of 1938 (Pub. L. No. 75-706, § 609, 52 Sta. 973, 1101 (1938), which borrows its judicial review concept from the Interstate Commerce Act of 1887, Ch. 104 § 16, 24 Stat. 379, 384-85 (1887), which, in turn, specifically preserved district court jurisdiction over claims that are not enumerated in the act for direct circuit court review.

4. Preclusion of district court jurisdiction denies meaningful review of discrimination claims.

To provide an exclusive review remedy, the Aviation Act must afford meaningful review to

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[2] *14 Penn Plaza L.L.C. v. Pyett*, 129 S. Ct. 1456, 1466 (2009), clarified dicta in *Gardner-Denver* that an explicit arbitration provision covering discrimination in a collective bargaining agreement can preempt a union employee's right to de novo judicial review of an ADEA claim. Otherwise, the rules in *Gardner-Denver* cited here remain good law.

claimants, including damages and other relief sought under Title VII or 42 U.S.C. § 1981, *Cf. Thunder Basin Coal Co.*, 510 U.S. at 207 and 212-213. However, the Aviation Act does not.

First, only Title VII provides the substantive basis and standing for a claimant to assert a discrimination or retaliation claim. The Aviation Act, of course, furnishes no such remedy or private cause of action. Second, § 46110(c) provides only limited relief: affirm, amend, modify, or set aside the order...; order the Administrator to conduct further proceedings; or grant further interim relief by staying the order or taking other appropriate action. Although, it fails to describe what other appropriate action means, any such action would necessarily be cabined within the expressed aviation safety purposes of the statute. Nothing adumbrates that it could encompass issues or relief already covered by other law or usurp remedies provided under Title VII or ADEA. To the contrary, the savings clause preserves any other remedies provided by law. 49 U.S.C. § 40120. § 46110 provides no relief in damages, back or front pay, attorney fees, or compensatory relief.

Second, judicial review under § 46110(c) does not allow the court of appeals to develop or determine the factual issues necessary to adjudicate a Title VII claim. Instead, the courts of appeals rely wholly upon the FAA's findings of facts under a substantial evidence standard. Pet. App. 40a. At the agency level, the FAA also has no authority to review or determine Title VII discrimination issues or provide any Title VII relief, including damages.

Consequently, because there is no § 46110 forum in which important aspects of FAA conduct, such as retaliation, could or would be challenged, judicial review in district court is necessary to ensure achievement of Title VII's most fundamental objectives. *Cf. Block,* 467 U.S. at 352. It is ineluctable that, if district court jurisdiction is denied, Jones and other federal employees like him will be foreclosed from any review of or relief for their retaliation claims.

Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, absent contrary congressional intent, the courts must regard each as effective. *Traynor,* 485 U.S. at 551, *in quoting Morton v. Mancari,* 417 U.S. 535, 551 (1974). In the case at hand, § 46110 and Title VII are not incompatible in design or purpose. Each does different things. Each is fully capable of providing judicial review of the issues within its respective domain, all without precluding or impinging upon the other's grant of jurisdiction.

B. The Fifth Circuit's decision below violates these principles.

Compared to the Second and D.C. Circuits, the Fifth Circuit does not address or follow this Court's rulings in *Chandler, Brown, Traynor, Block, MCorp Financial, Thunder Basin Coal Co.,* and *City of Tacoma*[3] or their progeny. First, and foremost, it also does not acknowledge the presence of Title VII's

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[3] While *Ligon* does recite the above quotation from *Merritt II*, which quotes *City of Tacoma*, it neglects to apply it in reaching its decision. *Ligon*, 614 F.3d at 154

competing grant of jurisdiction to the district courts over discrimination claims. Likewise, in *Ligon* the circuit court ignores a similar grant of jurisdiction to district courts under ADEA, 29 U.S.C. § 633a. Instead, it focuses solely on § 46110.

Second, and equally important, the circuit does not recognize that FAA must have statutory authority in order to consider discrimination and retaliation claims. Instead, it has constricted the collateral attack doctrine to merely examining if the district court suit would "require a review and balancing of the same evidence used by the FAA." *Ligon,* 614 F.3d at 157. As such, it diverges from the dictates of the Second and D.C. Circuits and this Court which require that even if a factual or procedural entanglement exists, the agency must still have the actual authority to hear a Title VII or ADEA claim.

Third, the Fifth Circuit, incorrectly relies upon cases involving § 46110 and *Bivens* claims.[4] *Ligon,* 614 F.3d at 157. However, *Bivens* cases are non-statutory claims. The presence of another jurisdictional statute, such as Title VII, to contest the Aviation Act's judicial review provision is dispositive. It necessarily requires the court to consider if Aviation Act's language, structure, purpose, and legislative history or whether the claims can be afforded meaningful review under § 46110. See *Thunder Basin Coal Co.,* 510 U.S. at 207. Here, of course, the lower court does not do so.

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[4] A *Bivens* claim is a judicially-created remedy for damages for unconstitutional conduct by federal officials. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971).

Fourth, the Fifth Circuit does not acknowledge the distinctive nature of a Title VII claim. Here, Jones asserts separate and independent statutory rights under Title VII. (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974)) and 42 U.S.C. § 1981. In his district court complaint, he does not ask to alter the FAA order. (Pet. App. 49a-50a.)[5] Significantly, the circuit panel overlooks the other Title VII relief also sought in Jones' complaint, such as monetary damages, including reasonable or general damages, compensatory damages and damages for mental anguish and humiliation, and loss of future earnings.[6] (Pet. App. 49a-50a) The Aviation Act cannot deliver monetary damages, the very kind of relief Jones seeks.

Moreover, district court jurisdiction exists over Title VII claims even if it could not exist over ADEA claims. Unlike the ADEA, Title VII provides decisively different relief and a different causation standard. These differences further compel trial *ne novo* of Title

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[5] The lower court incorrectly states that Jones' request to be placed "in the position he would have had but for" the discriminatory treatment means he asks to set aside the FAA order. (Pet. App. 5a). Instead, that merely invokes the "make whole" policy in Title VII for economic injury and back pay. *Armstrong v. Turner Indus.*, 141 F.3d 554, 560 (5th Cir. La. 1998) *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975). In his full prayer passage, he actually seeks to be made "whole for all earnings he would have received but for Defendant's discriminatory treatment." (Pet. App. 50a)

[6] For intentional discrimination, in an action under 42 U.S.C. § 2000e-16 and 2000e-5, claimant may recover compensatory damages, including future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses. 42 U.S.C. § 1981a.

VII claims. For instance, Jones seeks monetary relief, such as general damages, compensatory damages and damages for mental anguish and humiliation, and loss of future earnings recoverable under Title VII. See 42 U.S.C. § 1981a. Pet. App. 49a-50a. None of this relief is available in *Ligon* or under the ADEA. *See Smith v. The Office of Personnel Mgmt.*, 778 F.2d 258, 263 (5th Cir. 1985). Additionally, in contrast to the ADEA, Title VII claims allow mixed-motive submission, permitting other motivations to be considered, thus raising issues not addressable within the merits and procedures of the FAA review process. 42 U.S.C. § 2000e-2(m).

III. This Is An Important, Recurring Federal Question.

The Fifth Circuit's interpretation of § 46110 creates unreasonable consequences. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Merritt II*, 245 F.3d at 191. It has effectively granted implicit authority to FAA to adjudicate or dismiss Title VII claims. Yet, FAA has no statutory authority to do so, no expertise to do so, no procedural mechanism to investigate or rectify such claims, and no authority to grant the unique relief found in Title VII, including damages. This disrupts the comprehensive EEO process fashioned by Congress in vesting that authority in the EEOC and the district courts. Such a result defies Congressional design. The courts should not judicially shift or reshape congressional delegation of authority from one agency to another.

Here, citizens are unjustly barred from bringing such civil rights and Title VII claims in district court. Under the Fifth Circuit's approach, aggrieved former

employees in Jones' situation, may only assert their claims within the FAA review framework, even if they do not seek to alter or appeal a FAA order. Therein, they can obtain no damages or statutory relief. Such employees are cut off--disenfranchised of their statutory rights.

This will necessarily disrupt orderly administration of justice created by Congress under Title VII and similar statutes and fundamentally deny justice to those citizens. Unless given meaningful review in district court, Jones and others like him have no remedy for FAA's alleged retaliatory practices.

Allowing the current divide among the circuits to exist will not only dismantle the existing comprehensive EEO process, but also cause great uncertainty among claimants, federal agencies and counsel alike in knowing where to file and resolve discrimination claims. This is an important, recurring question that is ripe for this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion and Judgment, U.S. Court of Appeals for the Fifth Circuit (November 3, 2010) 1a

Appendix B: Memorandum Opinion and Order and Final Judgment, U.S. District Court, N.D. Texas (October 27, 2009) 8a

Appendix C: Denial of Petition for Rehearing, U.S. Court of Appeals for the Fifth Circuit (January 26, 2011) 21a

Appendix D: 42 U.S.C. § 2000e-5 . . . . . 23a
42 U.S.C. § 2000e-16 . . . . . 34a
49 U.S.C. § 40120 . . . . . 38a
49 U.S.C. § 46110 . . . . . 39a

Appendix E: Plaintiff's Original Complaint, U.S. District Court, N.D. Texas (October 23, 2008) 41a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-11239

[Filed November 3, 2010]

KENNEDY JONES,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; RAY LaHOOD, Secretary, Department of Transportation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division

Before DeMOSS, BENAVIDES, and ELROD, Circuit Judges.

PER CURIAM:

At issue is whether, under 49 U.S.C. § 46110(a), the district court had subject-matter jurisdiction over Jones's retaliation claims brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e,

and 42 U.S.C. § 1981. Because, under this court's precedent, his claims are inescapably intertwined with a challenge to the procedure and merits of a Federal Aviation Administrative (FAA) order, we hold that the district court lacked subject-matter jurisdiction. Accordingly, we AFFIRM the court's dismissal of Jones's claims.

Jones, a former employee of the FAA, applied to the FAA to be a Designated Engineering Representative (DER)—a "qualified private person" who inspects and certifies aircraft for compliance with FAA regulations. 49 U.S.C. §§ 44702(d)(1), 44704; 14 C.F.R. §§ 183.11(c)(1), 183.15(b). The FAA denied the application, finding that Jones lacked the required integrity and sound judgment. Under § 46110(a), Jones could have appealed this decision, but only to the United States Court of Appeals for the District of Columbia Circuit or the Fifth Circuit. *See* 49 U.S.C. § 46110(a). He did not. Instead, he sued Defendants in the district court, alleging that the denial was retaliation for his Equal Employment Opportunity activity while employed at the FAA. At Defendants' request, the district court dismissed all claims with prejudice for lack of subject-matter jurisdiction. Specifically, the court concluded that "plaintiff's claims are inescapably intertwined with a review of the procedures and merits of the FAA's order denying his DER application, and the complaint thus constitutes an impermissible collateral attack on the FAA order." *Jones v. LaHood*, 667 F. Supp 2d 714, 717 (N.D. Tex. 2009) (citation and internal quotation marks omitted). Jones timely appealed. On appeal, Defendants have changed their position on jurisdiction, but ask us to affirm on alternative grounds.

This court reviews questions of subject-matter jurisdiction *de novo*. *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010). Although the parties now agree that the district court had jurisdiction over Jones's claims, this court must determine subject-matter jurisdiction for itself. *Id.* at 153. The Supreme Court recently reemphasized that, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Haywood v. Drown*, 129 S.Ct. 2108, 2126 (2009) (citation omitted).

Section 46110(a) of the Federal Aviation Act vests the exclusive jurisdiction over challenges to FAA orders in certain United States Courts of Appeals:

> a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a). In *Ligon*, we addressed an indistinguishable situation and found that there was no subject-matter jurisdiction under § 46110(a). 614 F.3d at 152. There, the FAA had denied the plaintiff's request to renew his appointment as a DER in certain areas. *See id.* at 153. The plaintiff sued in district court, alleging that the denial was a result of age discrimination in violation of the Age Discrimination in Employment Act. *See id.* This court held that the

district court lacked jurisdiction because resolving Ligon's discrimination claim would require a "review and balancing of the same evidence used by the FAA in deciding not to renew his areas of authority . . . ." *See id.* at 157. Thus, the court concluded that the claim was "inescapably intertwined" with a challenge to the procedure and merits of the FAA's denial. *Id.* In addition, the court noted that a district court cannot grant the relief that the plaintiff sought—renewal of his DER authority—because only the two appropriate circuit courts have the jurisdiction to modify or set aside the orders of the FAA. *See id.*

Ligon forecloses the parties' contention that the district court had jurisdiction.[1] Here, it is undisputed that the FAA's denial of Jones's DER application constitutes a "final order" of the Administrator of the FAA. *See Atorie Air, Inc. v. Fed. Aviation Admin.*, 942 F.2d 954, 960 (5th Cir. 1991). Next, our review of the complaint and the briefs confirms that Jones's Title VII and § 1981 claims are inescapably intertwined with a challenge to the procedure and merits of that final order. The complaint alleges a number of procedural improprieties with the FAA's handling of his DER application. Jones also challenges the merits of the denial by alleging that it was based on false information. In addition, evaluating whether the FAA had a legitimate reason for denying Jones's application and whether the reason was a pretext for retaliation

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[1] In their letter to this court pursuant to Federal Rule of Appellate Procedure 28(j), Defendants concede that *Ligon* "suggests that the district court lacked jurisdiction over the Title VII claim in this case."

necessarily requires a review and balancing of the same evidence that the FAA had weighed.

Finally, the complaint seeks to set aside the FAA's denial of Jones's DER application by requesting the court to "[d]irect[] Defendant to place Plaintiff in the position he would have occupied but for Defendant's discriminatory treatment of him . . . ." As the complaint and briefs make clear, Jones alleges that the position that "he would have occupied but for" the discriminatory treatment and retaliation is that of a DER. In sum, under *Ligon*, Jones's Title VII and § 1981 claims are collateral attacks on a FAA order. This panel is bound by our previous decision in *Ligon*. Hence, the district court correctly determined that § 46110(a) precludes subject-matter jurisdiction over those claims.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-11239
D.C. Docket No. 4:08-CV-639

[Filed November 3, 2010]

KENNEDY JONES,	)
	)
Plaintiff - Appellant	)
	)
v.	)
	)
THE UNITED STATES OF AMERICA;	)
RAY LAHOOD, Secretary,	)
Department of Transportation,	)
	)
Defendants - Appellees	)
	)

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

Before DeMOSS, BENAVIDES, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party to bear its own costs on appeal.

ISSUED AS MANDATE: A True Copy
Attest
Clerk, U.S. Court of
Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

[USCA5 245]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NO. 4:08-CV-639-A

[Filed October 27, 2009]

KENNEDY JONES,	)
	)
Plaintiff,	)
	)
VS.	)
	)
RAY LAHOOD, SECRETARY, U.S. DEPARTMENT OF TRANSPORTATION (FEDERAL AVIATION ADMINISTRATION), AND THE UNITED STATES OF AMERICA,	)
	)
Defendants.	)

MEMORANDUM OPINION
and
ORDER

Now before the court are two motions filed in the above action by defendant Ray LaHood, Secretary of Department of Transportation, (Federal Aviation Administration) ("LaHood"): (1) motion to dismiss for lack of subject matter jurisdiction, and (2) motion for summary judgment. Plaintiff filed nothing in response to the motion to dismiss, but filed a response to the motion for summary judgment. Having considered the motions, plaintiff's response, and applicable legal authorities, the court concludes that the motion to dismiss should be granted, and the motion for summary judgment denied as moot.

[USCA5 246] I.

Background and Plaintiff's Claims

A. Designated Engineering Representatives

This case arises by the Federal Aviation Administration's ("FAA") denial of plaintiff's application for appointment as a Designated Engineering Representative ("DER"). Under the Federal Aviation Act ("Aviation Act"), the Administrator of the FAA "may issue airman certificates, type certificates, production certificates, airworthiness certificates, air carrier operating certificates, airport operating certificates, air agency certificates, and air navigation facility certificates," and "may delegate to a qualified private person" the authority to undertake the "examination, testing, and inspection necessary" to issue the certificates allowed under the Act. 49 U.S.C. §§ 44702(a), (d). Stated differently, the DER process enables the FAA to appoint qualified private individuals to perform examinations, tests, and inspections required to

determine compliance with FAA airworthiness regulations.[1] A DER ensures that private industry clients who hire the DER are in compliance with FAA regulations for airworthiness standards. See Steenholdt v. FAA, 314 F.3d 633, [USCA5 247] 634-35 (D.C. Cir. 2003). The FAA Administrator has delegated the authority to select DERs to Managers of local Aircraft Certification Offices ("ACOs") or their designees. 14 C.F.R. § 183.11(c)(1) (2009).

The FAA has also issued FAA Order 8100.8C, the Designee Management Handbook ("Handbook"), which establishes the "policy and procedures for the selection, appointment, orientation, training, oversight, renewal, tracking, and termination" of DERs. Def.'s App. to Mot. to Dismiss at 16. The Handbook sets forth a detailed application process, the requirements of which must be strictly followed by an individual seeking a DER appointment. To commence the process, the interested individual must submit an application package to the ACO or his or her designee. The application then proceeds through a detailed, multi-level review, culminating in a decision that the applicant is either appointed, identified as a candidate, or denied appointment. If an applicant is denied a DER appointment, he or she may, within sixty days of the date of receipt of the FAA decision letter, make a written request to the FAA for review by an Appeal Panel. The Appeal Panel may conduct a full review of the application process, including conducting interviews, reviewing the application file, reviewing

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[1] While a Designated Engineering Representative certificate is but one of several certificates or appointments authorized under the statute, it is the only one at issue in this action.

the initial justification for the initial decision, or **[USCA5 248]** considering any other documentation it deems necessary in making its decision. The decision of the Appeal Panel is the final step in the DER application process.

Although an applicant may be a current FAA employee when he or she initiates the DER application process, the employment relationship between the applicant and the FAA must terminate before an applicant may receive a DER appointment. The Handbook makes clear that DERs are not FAA employees.

B. Plaintiff's Claims

Plaintiff began his employment with the FAA in May 2001 as an aerospace engineer. In October 2007, plaintiff, while still employed by the FAA, initiated the DER application process.[2] On November 10, 2007, plaintiff resigned from his employment with the FAA. On November 19, 2007, plaintiff resubmitted his application package to be considered for DER appointment, and the application proceeded through the review process. Plaintiff was notified by letter dated February 8, 2008, of the denial of his DER application and of his right to appeal within sixty days. Plaintiff timely appealed, and an Appeal Panel was assembled, comprised of individuals who were not part of the initial review **[USCA5 249]** of plaintiff's application. On May 8, 2008, the Appeal Panel notified

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[2] Although the record is silent as to the fate of plaintiff's October 2007 DER application, it is irrelevant in resolving the motion to dismiss.

plaintiff of its decision to uphold the denial of his DER application.

Plaintiff filed the instant action on October 23, 2008, alleging that defendants denied his application for a DER because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"), and 42 U.S.C. § 1981, and in retaliation for his previous Equal Employment Opportunity activities during his employment with defendant.

II.

Applicable Legal Principles

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a case is properly dismissed when the court "lacks the statutory or constitutional power to adjudicate the case." Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998) (citations omitted). When confronted with a challenge to its jurisdiction, the court has broad power to weigh the evidence and satisfy itself that it has jurisdiction to hear the case. Williamson v. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981). When a defendant challenges the plaintiff's jurisdictional allegations, "the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." Ramming v. United States, **[USCA5 250]** 281 F.3d 158, 161 (5th Cir. 2001); Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980).[3]

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[3] As mentioned previously, LaHood also filed a motion for summary judgment, to which plaintiff filed a response. The court

III.

Analysis

A. Motion to Dismiss

LaHood contends that plaintiff's claims of race discrimination and retaliation under Title VII and § 1981 are essentially an impermissible collateral attack on the FAA's order denying his application for a DER appointment. The court agrees.

As discussed supra, the Aviation Act designates to the Administrator of the FAA the authority to issue DER certifications to qualified individuals, as determined by the FAA's established application and evaluation process. 49 U.S.C. § 44702; 14 C.F.R. § 183.11(c)(1). The decision to deny a DER application is a final order of the Administrator of the FAA, as it provides a "definitive statement of the agency's position" on the application, has a "direct and immediate effect" on the applicant's day-to-day business, and envisions "immediate compliance with its terms." Atorie Air, Inc. v. FAA, 942 F.2d [USCA5 251] 954, 960 (5th Cir. 1991); see also Green v. Brantley, 981 F.2d 514, 519 (11th Cir. 1993).[4] Under

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must first resolve the jurisdictional question before considering LaHood's attack on the merits. Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001).

[4] Although the authorities cited by LaHood, and those reviewed by the court in its own research, typically address revocation or non-renewal of an FAA certification, the reasoning of these cases appears to the court to be equally applicable to the situation in the instant action, where the court is faced with a denial of an

the statute, a person aggrieved by an order of the Administrator may "apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C. § 46110(a). As the courts of appeal are granted exclusive jurisdiction to review FAA orders, this court lacks jurisdiction to review the FAA order denying plaintiff's DER application.

Plaintiff's complaint, however, is before the court not as a direct appeal of the FAA's order, but as claims pursuant to Title VII and § 1981. Nevertheless, a review of the complaint leads to the conclusion that plaintiff's claims are "inescapably intertwined" with a review of the procedures and merits of the FAA's order denying his DER application, and the complaint thus constitutes an impermissible collateral attack on the FAA order. Green, 981 F.2d at 521. A claim is "inescapably intertwined" with an FAA order if it "could and should have been" presented to, and **[USCA5 252]** decided by, the court of appeals. Merritt v. Shuttle, Inc. ("Merritt II"), 245 F.3d 182, 188 (2nd Cir. 2001) (citing City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 339 (1958)). In other words, "the test for determining whether an exclusive jurisdiction provision precludes a district court from hearing a given claim is whether the administrative agency had the authority to decide th[e] issue raised by the claim." Id. at 188 n.9 (internal citations omitted).

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application for certification. See, e.g., Merritt v. Shuttle, Inc., 187 F.3d 263 (2nd Cir. 1999); Green v. Brantley, 981 F.2d 514 (11th Cir. 1993); Gaunce v. deVincentis, 708 F.2d 1290 (7th Cir. 1983).

Other courts considering the issue have held a plaintiff's claims in district court were "inescapably intertwined" with an FAA order where, for example, the plaintiff's complaint concerned the circumstances giving rise to the FAA's order suspending his pilot's certificate and challenged the "motivations and actions" of those involved in the decision, Merritt v. Shuttle, Inc. ("Merritt I"), 187 F.3d 263, 271-72 (2nd Cir. 1999), or where the plaintiff's challenge to the FAA's revocation of his airman's certificate would have required the court to engage in a fresh adjudication of the evidence, testimony, and credibility determinations adduced by the revocation proceedings, Tur v. FAA, 104 F.3d 290, 292 (9th Cir. 1997). See also Green, 981 F.2d at **[USCA5 253]** 521 (merits of plaintiff's Bivens[5] claims "inescapably intertwined" with review of the FAA's order rescinding his Designated Pilot Examiner certificate, where consideration of plaintiff's claims would require review of merits and procedures surrounding the FAA's order of rescission).

This is the scenario now before the court. A review of the allegations in plaintiff's complaint makes clear that his claims arise from the FAA's denial of his DER application. The complaint alleges that the DER application was rejected "based on false information," was in retaliation for plaintiff's previous filing of a charge of discrimination and "engaging in EEO activities," and was the result of FAA staff "target[ing] African-Americans" to deny them DER appointments. Pl.'s Compl. at 4, 7. Plaintiff also complains of the procedures followed with regard to his appeal to the

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[5] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

Appeal Board. As plaintiff's claims arise from the FAA's allegedly discriminatory and retaliatory denial of his DER application, and as he challenges the motives and actions of the FAA staff in denying his application, a determination by this court of plaintiff's claims would necessarily involve an adjudication of the DER application and decision-making process **[USCA5 254]** as applied to plaintiff[6]--a matter expressly reserved to the courts of appeal. See, e.g., Merritt I, 187 F.3d at 271-72; Tur, 104 F.3d at 292; Green, 981 F.2d at 521. Cf. Zephyr Aviation, L.L.C. v. Dailey, 247 F.3d 565, 572-73 (5th Cir. 2001) (declining to "impose a judicial exhaustion requirement on Bivens actions against FAA officials [in their individual capacities] when the Bivens suit does not implicate existing FAA enforcement actions.").

Of note is the absence of any response by plaintiff to the motion to dismiss. As plaintiff "constantly bears the burden of proof" that jurisdiction exists, Ramming, 281 F.3d at 161, the court can only interpret plaintiff's silence on the matter as a tacit acknowledgment that it does not. Accordingly, the court concludes that

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[6] It is less clear to the court that plaintiff's claims of being detained at the security desk on a few occasions after his employment terminated are "inescapably intertwined" with the FAA order denying his DER application. Even if they are not, the court concludes that those allegations fail to rise to the level of an adverse employment action necessary to establish a prima facie case of retaliation, nor can plaintiff meet the other elements of a prima facie case of retaliation as to those claims. See Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)(Title VII anti-retaliation provision not intended to immunize employee from "petty slights" or "minor annoyances" in the workplace).

plaintiff's claims should be dismissed for lack of subject matter jurisdiction.

B. Motion for Summary Judgment

In the motion for summary judgment, LaHood contends that should this court determine it has subject matter jurisdiction **[USCA5 255]** over plaintiff's claims, they should nevertheless be dismissed because: (1) plaintiff has failed to establish that he is an employee protected by Title VII; (2) he has failed to establish a prima facie case of retaliation; (3) LaHood had legitimate, non-discriminatory reasons for denying the DER application and for detaining plaintiff at the security desk; and (4) he cannot establish that LaHood's reasons are a pretext for unlawful discrimination or retaliation. A review of the summary judgment motion, plaintiff's response, and the summary judgment record leads the court to conclude that the motion has merit and would likely result in a grant of summary judgment as to all of plaintiff's claims and causes of action, were the court to determine it holds jurisdiction over those claims.

IV.

Order

Therefore,

For the reasons stated herein,

The court ORDERS that the motion to dismiss for lack of subject matter jurisdiction be, and is hereby, granted, and that all claims and causes of action brought by plaintiff, Kennedy Jones, against

defendants, LaHood and United States of America, be, and are hereby, dismissed with prejudice.

[USCA5 256]

The court further ORDERS that the motion for summary judgment filed by LaHood be, and is hereby, denied as moot.

SIGNED October 27, 2009.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

[USCA5 257]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NO. 4:08-CV-639-A

[Filed October 27, 2009]

KENNEDY JONES,	)
	)
Plaintiff,	)
	)
VS.	)
	)
RAY LAHOOD, SECRETARY, U.S. DEPARTMENT OF TRANSPORTATION (FEDERAL AVIATION ADMINISTRATION), AND THE UNITED STATES OF AMERICA,	)
Defendants.	)

FINAL JUDGMENT

Consistent with the memorandum opinion and order signed by the court in the above-captioned action on this same day,

The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action asserted by plaintiff, Kennedy Jones, against defendants, Ray LaHood, Secretary of Department of Transportation,

Federal Aviation Administration, and United States of America, be, and are hereby, dismissed with prejudice.

The court further ORDERS, ADJUDGES, and DECREES that defendants have and recover their costs of court from plaintiff.

SIGNED October 27, 2009.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-11239

[Filed: January 26, 2011]

KENNEDY JONES,	)
	)
Plaintiff - Appellant	)
	)
v.	)
	)
THE UNITED STATES OF AMERICA; RAY LAHOOD, Secretary, Department of Transportation,	)
	)
Defendants - Appellees	)

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING

Before DeMOSS, BENAVIDES, and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

/s/ Jennifer Elrod
United States Circuit Judge

APPENDIX D

UNITED STATES CODE SERVICE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

* * *

42 USCS § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this *title [42 USCS §§ 2000e-2 or 2000e-3]*.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging

that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information

in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such

charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this *title [42 USCS §§ 2000e* et seq.] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3) (A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this *title [42 USCS §§ 2000e* et seq.], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (*42 U.S.C. 1981a*), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years

preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case

involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this

section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with *rule 65 of the Federal Rules of Civil Procedure*. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this *title [42 USCS §§ 2000e* et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28 of the

United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to *rule 53 of the Federal Rules of Civil Procedure*.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement

or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704a [*42 USCS § 2000e-3(a)*].

(B) On a claim in which an individual proves a violation under section 703(m) [*42 USCS § 2000e-2(m)*] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § *42 USCS § 2000e-2(m)*] of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of *28 USCS §§ 101* et seq. not applicable to civil actions for prevention of unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 *(29 U. S. C. 101-*115), shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) Attorney's fee, liability of Commission and United States for costs. In any action or proceeding under this *title [42 USCS §§ 2000e* et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * *

42 USCS § 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in *section 102 of title 5, United States Code*, in executive agencies as defined in *section 105 of title 5, United States Code* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress. Except as otherwise provided in this subsection, the Civil Service

Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum

opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 [*42 USCS § 2000e* note] or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved

by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [*42 USCS § 2000e-5*] , in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions. The provisions of section 706(f) through (k) [*42 USCS §§ 2000e-5(f)*-(k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[.]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 [*42 USCS § 2000e* note] relating to equal employment opportunity in the Federal Government.

(f) Application of Lilly Ledbetter Fair Pay Act. Section 706(e)(3) [*42 USCS § 2000e-5(e)(3)*] shall apply to complaints of discrimination in compensation under this section.

* * *

UNITED STATES CODE SERVICE
TITLE 49. TRANSPORTATION
SUBTITLE VII. AVIATION PROGRAMS
PART A. AIR COMMERCE AND SAFETY
SUBPART I. GENERAL
CHAPTER 401. GENERAL PROVISIONS

* * *

49 USCS § 40120. Relationship to other laws

(a) Nonapplication. Except as provided in the International Navigational Rules Act of 1977 (*33 U.S.C. 1601* et seq.), the navigation and shipping laws of the United States and the rules for the prevention of collisions do not apply to aircraft or to the navigation of vessels related to those aircraft.

(b) Extending application outside United States. The President may extend (in the way and for periods the President considers necessary) the application of this part [*49 USCS §§ 40101* et seq.] to outside the United States when--

(1) an international arrangement gives the United States Government authority to make the extension; and

(2) the President decides the extension is in the national interest.

(c) Additional remedies. A remedy under this part [*49 USCS §§ 40101* et seq.] is in addition to any other remedies provided by law.

* * *

UNITED STATES CODE SERVICE
TITLE 49. TRANSPORTATION
SUBTITLE VII. AVIATION PROGRAMS
PART A. AIR COMMERCE AND SAFETY
SUBPART IV. ENFORCEMENT AND PENALTIES
CHAPTER 461. INVESTIGATIONS AND PROCEEDINGS

* * *

42 USCS § 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this *title [49 USCS § 41307 of 41509(f)]*, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part [*49 USCS §§ 40101* et seq.], part B [*49 USCS §§ 47101* et seq.], or subsection (l) or (s) of section 114 [*49 USCS § 114*] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures. When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court. When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection. In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review. A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

* * *

APPENDIX E

[USCA5 6]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. _____

[Filed October 23, 2008]

KENNEDY JONES)
)
Plaintiff,)
)
vs.)
)
MARY E. PETERS, SECRETARY)
DEPARTMENT OF)
TRANSPORTATION, (FEDERAL)
AVIATION ADMINISTRATION), AND)
THE UNITED STATES OF AMERICA.)
)
Defendant.)
)

JURY TRIAL DEMANDED

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Kennedy Jones, ("Mr. Jones"), Plaintiff in the above-styled cause, and complains of the United States Department of Transportation, Federal Aviation Administration ("FAA") and the United States of America, (hereinafter referred to as "Defendant"), and for cause of action would respectfully show:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction of Plaintiff's claims asserted pursuant to Title VII of the Civil Rights Act of 1964, ("Title VII") as amended, 42 U.S.C. § 2000e *et seq.* for race discrimination. Plaintiff hereby demands trial by jury on all claims to which he is entitled to jury trial.

2. Venue is proper in the Northern District of Texas, Fort Worth Division, **[USCA5 7]** because the Defendant does business in said district and the causes of action asserted herein arose in said district. Venue is proper under 42 U.S.C. § 2000e-5(f)3.

3. Plaintiff, is a former employee of the United States Department of Transportation/Federal Aviation Administration in Fort Worth, Texas, timely filed his race discrimination with the Agency and Notice of Intent to Sue and has completed all administrative requirements prior to initiation of this proceeding.

II.

PARTIES

4. Plaintiff is a citizen of the United States and a resident of Mansfield, Texas and at all times relevant hereto was an employee of Defendant.

5. Defendant, is located in Fort Worth, Texas and Tarrant County, Texas. At all times pertinent hereto, Defendant was, is, and has been an employer engaged in an industry affecting commerce with fifteen or more employees for each working day in each of twenty or more calendar weeks in each relevant calendar year and meets the definition of "employer" set forth in 42 U.S.C. § 2000e(b).

III.

PROCEDURAL REQUIREMENTS

6. Plaintiff has exhausted his administrative remedies. On or about April 2, 2008, Plaintiff filed a Charge of Discrimination (DOT Complaint No. 2008-21872-FAA-02) alleging race discrimination and reprisal/retaliation that satisfied the requirement of 42 U.S.C. § 2000e-5 with the Equal Employment Opportunity Commission ("EEOC") (attached hereto as Exhibit A). Such charge was filed within 300 days after one or more of the alleged unlawful employment practices in violation of Title VII occurred.

[USCA5 8]

7. On July 24, 2008, Plaintiff was issued a Notice of Right to Sue in DOT Complaint No. 2008-21872-FAA-

02, stating that Plaintiff could file a civil action under Title VII of the Civil Rights Act, as amended, within 90 days from the receipt of such Notice (attached hereto as Exhibit B). Plaintiff received a copy of the Notice on or about July 26, 2008. Plaintiff filed the Complaint in this case within 90 days after the date on which he received such Notice of Right to Sue.

IV.

FACTS

8. Mr. Jones, who is African-American (Black) began his employment with Defendant on May 2001. Mr. Jones was employed as an Aerospace Engineer in the Rotorcraft ACO, ASW-170. Mr. Jones entered into a settlement agreement with Defendant and voluntarily resigned effective November 10, 2007. The agreement between the Defendant and the Plaintiff was to leave the agency with a clean record and to have Mr. Jones Official Personnel File cleared of any and all disciplinary actions as a good faith demonstration that the Defendant was providing Mr. Jones with a clean record for present and future references.

9. On October 30, 2007 while still an employee of Defendant, Plaintiff made an application to be appointed as a Designated Engineering Representative, ("DER"). Plaintiff's application went to ASW-170 which is under the direct supervision of ASW-100, which is managed by David Downey.

10. Mr. Charles Harrison, the supervisor in ASW-170, refused to discuss with **[USCA5 9]** Plaintiff the status of his application package and also refused to follow the Order 8100.8C procedure and the past

practices of the Rotorcraft Directorate for handling Plaintiff's DER application.

11. After approximately 90 days Defendant mailed Plaintiff a rejection letter based on false information. The rejection was a reprisal/retaliation by Defendant on behalf of David Downey and the ASW-100 management for the settlement agreement the Plaintiff received for his departure from the FAA on November 10, 2007.

12. Moreover, Plaintiff's rejection was also due to the fact that the Defendant's management staff of ASW-100 has racially targeted African Americans to deny them the opportunity and privilege to be appointed as DER's.

13. There has never been an African American DER appointed by the Fort Worth Rotorcraft Certification office.

14. Upon appealing the denial of the DER application, as outlined in the FAA Order 8100.8C, the Plaintiff was denied due process to appear before the DER appeal board with legal counsel as the Plaintiff had request and as has been the past practice of the FAA Rotorcraft Directorate. Plaintiff was denied prior knowledge as to all members who would serve on the Appeal board and any contact with the Appeal board so that the Plaintiff and legal counsel might provide all needed information and testimony to refute false information used in the initial DER denial of Plaintiffs DER application. Individuals serving on the DER appeal board were in no position to properly evaluate the Plaintiff qualification due to past union activity and EEOC claims in which members of the appeal

board were the Defendants and the Plaintiff was either the aggrieved party or representing the aggrieved party as their local union representative. The Plaintiff was **[USCA5 10]** denied a proper appeal as required by the FAA Order 8100.8C and past Rotorcraft Directorate practices.

15. On numerous occasions Plaintiff visited the FAA building at 2601 Meacham Blvd, Fort Worth, TX for the purpose of doing business and was either detained or denied access as a means of harassment and intimidation. On November 17, 2007 Plaintiff visited the facility to meet with FAA engineers on certification business and was denied access. Plaintiffs picture was posted at the security guard gate like a most wanted poster for the purpose of intimidation and harassment. On January 11, 2008 the Plaintiff visited the facility for the purpose of meeting with certification engineers for certification purposes and was denied access to talk to certification engineers by FAA management of ASW-100. The receptionist at the front entrance pulled out a large photo taken from the Plaintiffs employee badge to be displayed in plain view. When asked by the Plaintiff why the photo was displayed the receptionist said she did not want to display the large photo but that she had been ordered to display the large photo in plain view for everyone to see. The photo was meant to imply that the Plaintiff was a security risk so as to harass and intimidate the Plaintiff. On January 24, 2008, Plaintiff was detained at the security gate and harassed when he went to the facility to meet with EEOC counselor Greg Hill. It took a verbal confrontation between Civil Right Office manager Kay Davis and Security manager Lisa Stewart to allow the Plaintiff to come up to the Civil Rights office to file the Plaintiff EEOC complaint. On March 7, the Plaintiff

visited the facility for the purpose of a telecom with union representative Marc Belhumeur and the National NATCA union representative, Tomaso DiPaolo. When Plaintiff arrived at the facility he was detained without any justification whatsoever.

[USCA5 11]

16. Plaintiff was singled out and treated differently than non African American's.

17. As a direct and proximate result of Defendant's discriminatory acts, Plaintiff has suffered and will continue to suffer monetary damages and damages for mental anguish unless and until this Court grants relief.

V.

CAUSES OF ACTION

18. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs 1 though 17 of this Complaint with the same force and effect as if set forth herein.

COUNT I: RACE DISCRIMINATION

19. Title VII of The Civil Rights Act of 1964, as amended in 1991, makes it illegal to discriminate against any employee on the basis of race, sex, national origin, or religion. Here, Defendant intentionally violated Plaintiff's federally protected rights by discriminating against him on the basis of his race (black). Mr. Jones was treated differently than similarly situated non-black employees. In particular,

Plaintiff was discriminated against in the form of disparate treatment in violation of Title VII.

COUNT II: SECTION 1981

20. Mr. Jones has also been subjected to different terms and conditions of employment because of his race.

21. Defendant intentionally violated Plaintiff's federally protected rights by discriminating against him on the basis of his race (black) in violation of the Thirteenth Amendment to the United States Constitution as protected by 42 U.S.C. § 1981.

[USCA5 12]

22. Mr. Jones was treated differently than similarly situated non-black employees. In particular, Plaintiff was discriminated against in the form of disparate treatment in violation of 42 U.S.C.§ 1981.

COUNT III: REPRISAL/RETALIATION

23. Mr. Jones was also retaliated against for having asserted his civil rights filing a previous charge of discrimination, EEOC No. 450-2007-00309X. Plaintiff settled that charge and resigned from Defendant on November 10, 2007.

24. Defendant retaliated against Plaintiff by denying the processing of his DER application according to Order 8100.8c and past practices of the FAA Fort Worth Rotorcraft Directorate office for engaging in previous EEO activities.

VI.

JURY TRIAL DEMAND

25. Plaintiff herein demands trial by jury.

VII.

PRAYER FOR RELIEF

26. As a direct and proximate result of the wrongful acts and conduct of Defendant, Plaintiff, has suffered reasonable damages. His damages include loss of income, loss of earning potential, mental anguish, stress, humiliation, mental anxiety, and embarrassment, which occurred in the past and which are reasonably expected to continue into the future.

27. Plaintiff is also entitled to recover exemplary damages because of the willful **[USCA5 13]** and malicious conduct of Defendant in wrongfully discriminating against him because of his race and reprisal for previous EEO activities.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, prays that Defendant be cited to appear in court and answer this lawsuit, and that judgment be rendered on behalf of Mr. Jones in an amount in excess of the minimal jurisdictional requirements of this Court, to include the following:

a. Declaring that the acts and practices complained of herein are in violation of Title VII;

b. Enjoining and permanently restraining these violations of Title VII;

c. Directing Defendant to take such affirmative action as is necessary to ensure that the effects of these unlawful employment practices are eliminated;

d. Directing Defendant to place Plaintiff in the position he would have occupied but for Defendant's discriminatory treatment of him, and make him whole for all earnings he would have received but for Defendant's discriminatory treatment;

e. Awarding Plaintiff the costs of this action together with reasonable attorney's fees, as provided by 42 U.S.C. § 2000e-5(k);

f. Declaring that the acts of the Defendant and practices complained of herein are in violation of Title VII;

g. Directing Defendant to pay Plaintiff compensatory damages and damages for his mental anguish and humiliation;

h. Directing Defendant to pay Plaintiff pre-judgment and post-judgment interest; and

[USCA5 14]

i. Granting such other and further relief as this Court deems necessary and proper.

Respectfully submitted,

LAW OFFICE OF JIM LANE
/s/ Jim Lane
James Lane
Federal I.D No. _____
State Bar No. 11879200
Conrell Brown
State Bar No. 03106900
Ronald E. Reynolds
State Bar No. 24025610
204 W. Central Avenue
Fort Worth, Texas 76164
(817) 625-5582 Telephone
(817) 625-5881 Facsimile

ATTORNEYS FOR PLAINTIFF, KENNEDY JONES

[USCA5 15]

EXHIBIT A

U.S. Department of Transportation

Departmental Office of
Civil Rights

Compliance Operations Division
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

Office of the Secretary
Of Transportation

CERTIFIED MAIL/7003 0500 0005 0355 6838
RETURN RECEIPT REQUESTED

July 24, 2008

Kennedy Jones
1901 Spirit Walk
Mansfield, TX 76063

Ref: DOT Complaint No. 2008-21872-FAA-02

Dear Mr. Jones:

This is in further reference to your complaint of discrimination filed on April 2, 2008. You have raised a claim of discrimination against the Department of Transportation (DOT), Federal Aviation Administration (FAA). Complaints filed against the DOT are processed in accordance with the Equal

Employment Opportunity Commission's (EEOC) regulation, at 29 C.F.R. § 1614, as amended.

Based on a thorough review of your complaint, the EEO counselor's report, and related documents the following claims have been identified:

A. Were you discriminated against on the basis of your **race** (Africa American) and/or in **reprisal** (prior EEO complaint) when your application for FAA Consultant Designated Engineering Representative (DER) certification was denied?

B. Were you discriminated against on the basis of your **race** (African American) and/or in **reprisal** (prior EEO complaint) when on November 17, 2007, January 11, 2008, and January 24, 2008, you were stopped at the gate of the FAA Southwest Regional Office and were made to wait until someone would come to get you?

A decision to dismiss your claims has been made for the following reason:

Title VII of the Civil Rights Act of 1964, as amended, prohibits federal agencies from discriminating against agency employees or applicants for employment on the basis of race and in reprisal for prior protected activity. 42 U.S.C. § 2000e-16(a) et seq. You have indicated that you are no longer employed by the FAA and that you are a contractor. **[USCA5 16]** Consequently, you do not meet the criteria to file an EEO complaint. Therefore, pursuant to EEOC Regulation 29 C.F.R. § 1614.107(a)(1), your claims are hereby dismissed for failure to state a claim.

If you are dissatisfied with this final agency decision, you have the following appeal rights:

-- Within 30 calendar days of your receipt of this final decision, you have the right to appeal this decision to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, DC 20036.

(EEOC Form 573, Notice of Appeal/Petition, enclosed for this purpose.)

-- Within 90 calendar days of your receipt of this action, you may file a civil suit in an appropriate U.S. District Court. The Court, at your request, may appoint and authorize legal counsel in circumstances that it deems just without the payment of fees, costs, or security. The granting or denial of the request is within the sole discretion of the Court.

You must name the person who is the official agency head or department head and his or her official title as the defendant in. your appeal. In your case, you must name the following official as the defendant:

The Honorable Mary E. Peters
Secretary of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Failure to provide the name or official title of the agency head or department head may result in dismissal of your case. Please be advised that at the time you file any appeal or civil action, you must

furnish a copy of the appeal documents to the following officials:

Associate Director
Compliance Operations Division
Department of Transportation
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

Jerry Mellody
Assistant Chief Counsel
Personnel and Labor Law Staff, AGC-30
Office of the Chief Counsel
Federal Aviation Administration
800 Independence Ave., S.W
Washington, D.C. 20591

[USCA5 17]

Additionally, you have also raised the following claim:

> Were the terms of your settlement agreement signed on November 10, 2007, violated when your DER certification was denied based on incidents which occurred during your employment with the FAA?

You claim that your settlement agreement contains a clause that indicated you would be leaving the FAA with a "clean record."

Pursuant to § 1614.504 (b) this office has thirty-five (35) days to respond to your allegations in writing. The regulations provide for two possible relief options on a breach complaint {§ 1614.504(a)} and they are 1) specific implementation of the portion of the

agreement that was breached, or 2) return to the EEO process at the point where processing ceased. The regulations do not provide for an employee to initiate a new complaint over the alleged noncompliance.

If you are dissatisfied with the final decision, you have the right to appeal the final decision to the:

Equal Employment Opportunity
Commission (EEOC)
Office of Federal Operations
P.O. Box 19848
Washington DC 20036

Such appeals must be filed by you in writing and be received by the EEOC Office of Federal Operations within 30 calendar days from the date you receive that decision. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that the Department receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have additional questions regarding the processing of your breach allegation, you may contact:

Judy Sommers
Acting Regional Director
Fort Worth Regional Office
Empire Central Building
7701 North Stemmons Freeway, Suite 130
Dallas, TX 75247
Phone: (214) 767-5870

[USCA5 18]

Toll Free: (866) 355-5312
Fax: (214) 767-5883
Email: judy.sommers@faa.gov
TTY: (214) 767-5874

Sincerely,

/s/ Tami L. Wright
Tami L. Wright
Associate Director

Enclosure: EEOC Form 573

cc: ACR-1
w/o Enclosure

AGC-30
w/o Enclosure

[USCA5 19]

EXHIBIT B

[Seal] **Federal Aviation Administration**

Memorandum

Date: March 19, 2008

To: Mr. Kennedy Jones, Aggrieved Person

From: EEO Counselor, Office of Civil Rights

Subject: Notice of Final Interview and Right to File a Discrimination Complaint

(Case 2008-21872-FAA)

This is to inform you that because the matter you brought to my attention has not been resolved to your satisfaction, you are now entitled to file a discrimination complaint based on race, color, religion, sex, national origin, physical or mental handicap, age, reprisal and/or sexual orientation. If you file a complaint, it must be in writing, signed, and filed, in person or by mail within 15 calendar days after receipt of this notice, with the following official authorized to receive discrimination complaints:

Original to:	Copy to:
Associate Director U. S. Department of Transportation	Federal Aviation Administration Assistant Administrator

Departmental Office of Civil Rights
Compliance Operations Division (S-34)
1200 New Jersey Avenue, SE, W35-210
Washington, DC 20590

for Civil Rights
Complaints Team (ACR-5)
800 Independence Avenue SW, Room 1030
Washington, DC 20591

The complaint must be specific and contain only those issues discussed with me. It must also state whether you have filed a grievance under a negotiated grievance procedure; an appeal to the FAA Tri-Party Panel; or a complaint with the Merit System Protection Board on the same claims(s). For your use, a copy of the Complaint of Discrimination in the Federal Government form is provided.

If you retain an attorney or any other person to represent you, you or your representative must immediately notify the Regional Director of the Departmental Office of Civil Rights, in writing. You and/or your representative will receive a written acknowledgment of your discrimination complaint from the appropriate agency official.

If your allegations concerned sexual harassment; misconduct of a sexual nature; reprisal for having reported sexual harassment; allegations or incidents of verbal, written, graphic or physical harassment; or other misconduct that creates or may create an intimidating, hostile or offensive work environment, it was reported to the FAA Accountability Board. If you had requested anonymity, the report was made such not to reveal your identity. The report to the

Accountability Board does not alter the periods of the EEO complaint process in any way.

/s/ Helen M. [ ]
for
Cynthia Allen
EEO Counselor

/s/ Kennedy Jones received 3/24/08
Aggrieved Individual's
Acknowledgement
Date of Receipt:

Attachment

CR-8
Revised 09/06

[USCA5 20]

7. EXPLAIN HOW YOU BELIEVE YOU WERE DISCRIMINATED AGAINST (TREATED DIFFERENTLY FROM OTHER EMPLOYEES OR APPLICANTS) BECAUSE OF YOUR RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, HANDICAP, OR SEXUAL ORIENTATION. (For each allegation, please state to the best of your knowledge, information and belief, what incident occurred And when the incident occurred.) (Continue on reverse of form or add additional sheets.)
On, November 10th, I made application to be appointed as a Designated Engineering Representative, DER. My application went to ASW-170 which is under the direct supervision of ASW-100, which is managed by David Downey. Mr. Charles Harrison, the supervisor in ASW-170, refused to discuss with me my application package, refused to follow the Order 8100.8 which specifically outlines the DER process and processing procedures. Mr. Harrison literally created a whole new procedure for handling my DER application. After approximately 90 days Mr. Harrison, personally mailed me a rejection letter based on facetious, erroneous, misinformation. This rejection was a reprisal by Mr. Harrison on behalf of David Downey and the ASW-100 management for the settlement agreement which I received in my departure from the FAA on November 10. Furthermore, I feel this rejection was also due to the fact that the management staff of ASW-100 has racially targeted African Americans to deny them the opportunity to

and privilege to be appointed as DER's. To my knowledge and the knowledge of those that have served in ASW-100 for over 30 years. There has never been an African American DER. On March 7, I visited the FAA Building at 2601 Meacham Blvd, Fort Worth, TX for the purpose of a telecom with a union representative Marc Belhumeur and the National NATCA union representative, Tomaso DiPaolo. As I came to the facility, once again I was detained without any justification at all. Singled out, humiliated, degraded and made to wait until Lance Gant was informed. Mr. Gant was again provided surveillance information as to my entrance into the facility. After some discussion between Mr. Gant and the security personnel, I was allowed on the premises. I was not sure that I would be allowed into the facility based upon the degrading, humiliating treatment I had received before at the hands of Lance Gant, Charles Harrison, Mark Schilling, and David Downey, the management officials of ASW-100. Furthermore, I must add that this treatment could not have occurred without the consent and participation of Lisa Stewart, head of building facility. It is certain that David Downey, Directorate Manager, and Mark Schilling, his assistant, being responsible for ASW-100 and being the supervising managers for Charles Harrison and Lance Gant are fully responsible for this disparaging, retaliatory, reprisal treatment that I have received.

I have not filed a grievance under a negotiated grievance procedure or any other procedure. I have not filed an appeal to the FAA Tri-Party Panel. I have not filed a complaint, with the Merit System Protection Board on this claim.

8. I HAVE DISCUSSED MY COMPLAINT WITH AN EQUAL EMPLOYMENT OPPORTUNITY COUNSELOR _X_ YES ___ No	NAME OF COUNSELOR **Helen Savoy, Office of Civil Rights, ACR-5**
9. WHAT CORRECTIVE ACTION ARE YOU SEEKING? Removal of Lisa Stewart from head of building Security for misuse of her federal authority to violate my civil rights. Removal of David Downey from his position of Directorate Manager for misuse of federal authority for conducting unwarranted surveillance on a private citizen, myself. Removal of Mr. Downey from his position for misuse of federal authority to create a climate of fear and intimidation within ASW-100 and toward my person. Removal of Mr. Downey from his position for participating in or allowing his management representatives to commit actions of reprisal against my person. Removal of Mark Schilling, Lance Gant, and Charles Harrison from their management positions for abuse of their federal authority in initiating and conducting an unwarranted surveillance upon a private citizen without justification or proper authorization. Removal of Mark Schilling, Lance Gant, and Charles Harrison from their positions for abuse of their federal authority in committing acts of reprisal and discrimination against my person. The extension of DER delegation appointment to myself to end the years of discriminatory behavior toward African American seeking DER appointments out of the Southwest Region. Reimbursement for the millions	

of dollars of financial damage suffered by myself and my company.	
10. DATE OF THIS COMPLAINT *(Month, Day, Year)* **APRIL 2, 2008**	11. SIGN YOUR (COMPLAINANT'S) NAME HERE /s/ Kennedy Jones

[USCA5 21]

7. EXPLAIN HOW YOU BELIEVE YOU WERE DISCRIMINATED AGAINST (TREATED DIFFERENTLY FROM OTHER EMPLOYEES OR APPLICANTS) BECAUSE OF YOUR RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, HANDICAP, OR SEXUAL ORIENTATION. (For each allegation, please state to the best of your knowledge, information and belief, what incident occurred And when the incident occurred.) (Continue on reverse of form or add additional sheets.) On or about the week of November 17, 2007, a business associate, Audry Johnson of Arlington TX, and I came out to the FAA facility at 2601 Meacham Blvd, Ft. Worth, TX and were stopped at the gate. I was told I could not enter until certain individuals were notified. I asked why, the guards said they could not tell me. I asked who the individuals were who needed to notified. They would not tell me. They then told me to park over on the side of the curb and waited. No one else has been treated this way for no justifiable cause. Upon leaving I noticed that my picture was posted at the guard gate inside the guard building in plain view for anyone leaving the facility as if I was a criminal. No one else who has resigned in good standing has ever been treated with such shameless humiliating disregard. On January 11, 2008, I visited the facility. Again, I was stopped at the gate for no reason. Several phone calls were made and after a few minutes, while other cars were passing by my vehicle, I was permitted on the premises. When I got to the receptionist

desk, Pansey Kennard, told me that only three people were allowed to receive me at the building. She showed me the 8 1/2 x 11 inch picture still in her desk. She told me that she had been told to keep the picture in the desk drawer even though Pansey has known me for almost a year and doesn't need a picture to identify me. To my knowledge no one else's picture has been kept in the receptionist drawer beside mine. Whenever, the drawer opens you cannot help but to notice my picture like a wanted poster. This image cannot help but have damming consequences should I be assisted by clients coming in with me to the facility. I stood down in that lobby for an extended period of time but no one came. Then I asked to have someone from the regional administrator's office, Ms. Teri Bruner, meet with me so I could discuss the humiliating degrading treatment I was receiving but I was told I could not call anyone in her office. I then asked for someone in the Civil Right office to be called and was told that I could not see anyone in the Civil Rights office without what was effectively David Downey's permission. After, some period of time, I left the facility because no one came or answered the receptionist calls.

On January 24th, I arrived at the FAA facility to have a meeting with, Greg Hill, Jr. in the Civil Rights office, at approximately 12:15 noon. At the gate I was again stopped and spent over 30 minutes waiting there. The guards told me they had been instructed not to contact anyone else but those on the list to allow me to gain entry to

the facility. I called Greg Hill and informed him of my dilemma and he and his manager got me into the facility. When I went to the receptionist to get my temporary badge, Kay Davis, head of the local CIVIL RIGHTS office, met me downstairs. When she attempted to take me upstairs, she was prohibited by security. The receptionist told Ms. Davis she was only doing what she had been ordered to do. During this whole time, Lance Gant, Charles Harrison, nor Lisa Stewart returned a call to the receptionist or security even though they were there. Many of my friends, colleagues and past union members told me they saw Ms. Stewart come to Lance Gant office at the same time I was down stairs being humiliated and degraded. Ms. Stewart had to be called several times on her cell phone before she would answer. A check of her cell phone bill should verify this. (Continue on next page)

[USCA5 22] Mailed 4/2/08

DEPARTMENT OF TRANSPORTATION	COMPLAINT OF DISCRIMINATION IN THE FEDERAL GOVERNMENT (Privacy Act Statement attached)	(FOR AGENCY USE) Complaint #2008-21872-FAA

BECAUSE OF RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, HANDICAP, Reprisal or Sexual Orientation
(Please Type or Print)

1. WHAT IS YOUR (COMPLAINANT'S) FULL NAME	2. WHAT IS YOUR TELEPHONE NO.?
Kennedy Jones	817-229-9561

YOUR STREET ADDRESS (or RD Number of Post Office Box Number)			HOME PHONE
1901 Spirit Walk			817-473-8892
YOUR CITY	STATE	ZIP CODE	WORK PHONE
Mansfield	TX	76063	817-229-9561

a. NAME OF OFFICE WHICH YOU BELIEVE DISCRIMINATED AGAINST YOU	a. NAME OF AGENCY WHERE YOU WORK
b. STREET ADDRESS OF OFFICE	
c. CITY STATE ZIP CODE	c. CITY STATE ZIP CODE
	WHAT IS THE TITLE AND GRADE OF YOUR JOB?

5. DATE OF WHICH MOST RECENT ALLEGED DISCRIMINATION TOOK PLACE

MONTH	DAY	YEAR
03	07	2008

6. CHECK BELOW WHY YOU BELIEVE YOU WERE DISCRIMINATED AGAINST

__ RACE, IF SO, STATE YOUR RACE ____

X COLOR, IF SO STATE YOUR COLOR AFRICAN AMERICAN

__ RELIGION, IF SO, STATE YOUR RELIGION ____

__ NATIONAL ORIGIN, IF SO, STATE YOUR NATIONAL ORIGIN _____

No. 10-1330

In the Supreme Court of the United States

KENNEDY JONES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
MICHAEL P. ABATE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioner brought suit under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, to challenge an order of the Federal Aviation Administration denying him authorization to issue airworthiness certifications.

The question presented is whether the Federal Aviation Act, which gives the courts of appeals exclusive jurisdiction to review orders related to "to aviation duties and powers designated to be carried out by the Administrator," 49 U.S.C. 46110(a), deprived the district court in this case of jurisdiction over petitioner's Title VII claims.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 11
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Battle v. *FAA*, 393 F.3d 1330 (D.C. Cir. 2005) 13
Beins v. *United States*, 695 F.2d 591 (D.C. Cir. 1982) ... 14
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 8
Breen v. *Peters*, 474 F. Supp. 2d 1 (D.D.C. 2007) 15
Brown v. *General Servs Admin* , 425 U.S. 820 (1976) 9, 11, 12
Chandler v. *Roudebush*, 425 U.S. 840 (1976) 9, 11
City of Pittsfield v. *EPA*, 614 F.3d 7 (1st Cir. 2010) 12
City of Santa Monica v. *FAA*, 631 F 3d 550 (D C. Cir. 2011) 12
Cook v. *Pan American World Airways, Inc.*, 771 F.2d 635 (2d Cir. 1985) 14, 15
Davis v. *United States*, 204 F.3d 723 (7th Cir. 2000) 20
Davis-Warren Auctioneers v. *FDIC*, 215 F.3d 1159 (10th Cir. 2000) 20
Dotson v. *Griesa*, 398 F.3d 156 (2d Cir. 2005) 20
Flamingo Exp , Inc. v. *FAA*, 536 F.3d 561 (6th Cir. 2008) 12
Green v. *Brantley*, 981 F.2d 514 (11th Cir. 1993) 8

Cases—Continued: Page

Lee v. *Hughes*, 145 F.3d 1272 (11th Cir. 1998) 20
Ligon v. *LaHood*, 614 F.3d 150 (5th Cir. 2010), petition for cert. pending, No. 10-1185 (filed Jan. 12, 2011) 10, 12, 15, 16
Lorance v. *AT&T Technologies, Inc.*, 490 U.S 900 (1989) 14
Menard v. *FAA*, 548 F.3d 353 (5th Cir. 2008) 12
Merritt v. *Shuttle, Inc.*:
245 F.3d 182 (2d Cir. 2001) 14
187 F.3d 263 (2d Cir. 1999) 8
Newton v. *FAA*, 457 F.3d 1133 (10th Cir. 2006) 12
Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 16, 17
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 12
Tur v. *FAA*, 104 F.3d 290 (9th Cir. 1997) 8

Statutes and regulations:

Administrative Procedure Act, 5 U.S C. 706 12
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq* 4, 7, 8, 12, 17
42 U.S.C. 1981 ..... 7, 8
42 U.S.C. 1981(a) 5
42 U.S.C. 1981(c) 5, 19
42 U.S.C. 2000e-16(a) 4
49 U.S.C. 44702(a) 2
49 U.S.C. 44702(d)(1)(A)-(B) 2
49 U.S.C. 46110 ..... 7, 13
49 U.S.C. 46110(a) 4, 11, 12, 4, 10, 12
49 U.S.C. 46110(c) 4, 10, 12, 16

Statute and regulations—Continued: Page

49 U.S.C. 46110(d) 12
5 C.F.R. 293.402 19
14 C.F.R.:
Section 13.235 4
Section 183.11(c)(1) 3
Section 183.29 2

Miscellaneous:

FAA Order 8100.8C (2010), http://www.faa.gov/documentLibrary/media/Order/8100.8C%20CHG%201-6.pdf (May 31, 2011) 2, 3, 4, 17, 18, 19

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 625 F.3d 827. The order of the district court (Pet. App. 8a-18a) is reported at 667 F. Supp. 2d 714.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2010. A petition for rehearing was denied on January 26, 2011 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on April 26, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Aviation Act grants to the Administrator of the Federal Aviation Administration (FAA) the

authority to issue certificates related to air safety and navigation. 49 U.S.C. 44702(a). It also allows the Administrator to delegate "to a qualified private person" the authority to issue such certificates or to perform the tests, examinations, and inspections necessary to their issuance. 49 U.S.C. 44702(d)(1)(A)-(B).

Pursuant to this statutory authority, the Administrator has created the Designated Engineering Representative (DER) program. See 14 C.F.R. 183.29.[1] DERs are designees of the Administrator empowered to "perform examinations, inspections, and witness tests in the * * * engineering area[]." FAA Order 8100.8C § 300 (2010).[2] The FAA has stated explicitly that DERs, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." *Id.* § 300(f). Although DERs are certified by the FAA, they are independent contractors hired by the private aircraft industry to inspect private airplanes. See Pet. App. 2a. DERs are authorized to perform only the tests and inspections for which they are certified (their "authorized areas"). See FAA Order 8100.8C §§ 306, 309. They may not be delegated the authority to perform any "inherently governmental functions" such as approving "departures from specific policy and guidance, new/unproven technologies, equivalent level of safety findings, special conditions, or exemptions." *Id.* § 300(c).

Designees are selected from among qualified applicants by the Manager of the Aircraft Certification Of-

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[1] The DER program is only one of many "air designee" programs. As of 2008, the Administrator relied on approximately 11,000 designees to perform a variety of functions.

[2] FAA Order 8100.8C, http://www.faa.gov/documentLibrary/media/Order/8100.8C%20CHG%201-6.pdf (May 31, 2011).

fice, 14 C.F.R. 183.11(c)(1), pursuant to procedures and criteria spelled out in FAA Order 8100.8C. DER applicants must submit an application package demonstrating that they are qualified for the position, including that they meet four sets of appointment criteria: "regulatory" criteria, "technical" criteria, "interface" criteria (including the requirement of "integrity, professionalism, and sound judgment"), and "standardization" criteria. FAA Order 8100.8C § 401, Tbls. 4-1 through 4-4. Complete applications are reviewed by the Appointing Office Manager, who determines whether the applicant would be an asset to the office, and whether the agency has the need for and ability to manage the DER appointment. Gov't C.A. R.E. 23 (Harrison Decl. ¶ 6). If the Manager is satisfied that those conditions are met, the application is reviewed by an Advisor who makes a preliminary recommendation on whether to grant or deny the DER application. *Id.* at 23-24 (Harrison Decl. ¶ 7).

In reviewing an application, the Advisor examines whether the DER applicant meets all relevant criteria; has had direct interaction with the FAA; and has provided verifiable documentation. Gov't C.A. R.E. 23-24 (Harrison Decl. ¶ 7); FAA Order 8100.8C § 401(c). The Advisor also makes a determination about whether the FAA has the need for and ability to manage the DER. *Ibid.* If the Advisor recommends approval of the application, the Appointing Office Manager convenes an Evaluation Panel to further review the application. Gov't C.A. R.E. 23-24 (Harrison Decl. ¶ 7). If the Advisor recommends denial of the application, the application is instead returned to the Appointing Office Manager to review the justification for the denial. *Ibid.*; FAA Order 8100.8C § 502(b).

If a DER application is denied, the applicant may appeal that decision to an administrative Appeal Panel. FAA Order 8100.8C §§ 600-601. The Appeal Panel must consider all available information and may interview the applicant or FAA personnel, or may invite other persons to be resources at its deliberations. *Id.* § 601. The panel may decide to "[s]upport the original decision"; "[o]verride the original decision"; or "[d]irect a repeat of any part of the appointment process." *Id.* § 602. Its decision represents the final decision of the agency. *Id.* § 601. An order from the Appeal Panel qualifies as a final decision of the Administrator. *Ibid.*

The Aviation Act authorizes direct review in the federal courts of appeals of all final decisions of the Administrator with respect to aviation duties and powers. 49 U.S.C. 46110(a) (providing that any "person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator * * * may apply for review of the order by filing a petition for review in" the D.C. Circuit or the regional court of appeals within 60 days of the order); see 14 C.F.R. 13.235. The appellate court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order," and must defer to the Administrator's findings of fact, which, "if supported by substantial evidence, are conclusive." 49 U.S.C. 46110(c).

2. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination in the federal workplace based on race, color, religion, sex, or national origin. As applied to the federal government, Title VII protects "employees or applicants for employment" in specified agencies. 42

U.S.C. 2000e-16(a). It does not cover individuals who are not federal employees or who are not attempting to become federal employees.

3. Section 1981 of Title 42 of the United States Code provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to * * * the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. 1981(a). The statute protects such rights "against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. 1981(c).

4. a. Petitioner was employed by the FAA from 2001 until 2007, when he left the agency as part of a settlement of previously filed race-discrimination charges. Pet. App. 44a; see Pet. 2. Shortly after he left the FAA, petitioner applied to be certified as a DER. Pet. App. 11a; Gov't C.A. R.E. 25 (Harrison Decl. ¶ 9.a). As required by FAA procedures, the Appointing Office Manager, Charles Harrison, reviewed petitioner's application and determined that he would "not be an asset" to the office as a designee. *Ibid.* (Harrison Decl. ¶ 9.c); *id.* at 27 (Tracking Document). Harrison sent petitioner a letter advising him that his application had been denied and explaining the basis for that decision. *Id.* at 25 (Harrison Decl. ¶ 9.d).

The letter to petitioner stated that he had failed to meet the appointment criteria set forth in FAA Order 8100.8C—specifically, the requirement that he "possess a high degree of integrity, sound judgment, and a cooperative attitude." Gov't C.A. R.E. 31. The letter provided five specific examples calling petitioner's integrity and judgment into question: (1) a 2006 incident in which petitioner submitted his resume to a company for which

he had FAA oversight responsibility; (2) a separate 2006 incident in which petitioner asked a departing supervisor to remove a suspension from his personnel file, which the supervisor refused to do in part because petitioner had "an integrity problem"; (3) a 2007 incident in which officials at the FAA academy requested that petitioner not return as a trainer because of his poor performance and lack of professionalism during a prior course; (4) a 2007 incident in which petitioner inappropriately used his government credit card for personal reasons; and (5) information that petitioner had been distributing business cards to private industry indicating that he had already obtained the DER certification for which he was applying. *Id.* at 31-32, 40 (sample business card).

b. Petitioner filed a timely administrative appeal of the denial of his DER application, requesting "a thorough review of the process conducted in making this adverse decision and that the decision be reversed and [he] be appointed a FAA DER." Gov't C.A. R.E. 25, 33. Petitioner further requested that his application be submitted to the Advisor and then an Evaluation Panel, and that specific individuals be excluded from any further decisions regarding his DER application because he had previously named them in discrimination complaints filed against the agency. *Id.* at 33. Finally, petitioner asked to appear before the panel, to call witnesses, and to make arguments. *Ibid.* At the Appeal Panel's request, petitioner submitted an additional letter detailing the issues he intended to raise if called before the Appeal Panel. *Id.* at 35-37. Although the letter notes that petitioner believed he would be the first African-American engineer to be appointed a DER in the region, he did not allege that he was denied the certification either

because of his race or in retaliation for his prior charges of race discrimination. See *id.* at 36 (¶ 9).

The Appeal Panel upheld the denial of petitioner's DER application. The panel's decision letter noted that petitioner had failed to adequately respond to the primary bases for denial of his application, *i.e.*, that he lacked "a high degree of integrity, sound judgement, and cooperative attitude." Gov't C.A. R.E. 38. Although petitioner's appeal letter "briefly addressed" his cooperative attitude, he provided no information to rebut the conclusion that he lacked integrity or sound judgment. *Ibid.* The letter explained that "it is imperative that [DERs] possess a high degree of integrity and sound judgment" because of "the safety critical work" that DERs perform. *Ibid.* The Appeal Panel also rejected petitioner's contention that the process the FAA used to evaluate his application was improper, concluding that it "was appropriate concerning the circumstances." *Ibid.* The Panel found that the Manager appropriately "made a determination, based upon experience, that [petitioner] would not be an asset" to the office, and was therefore justified in denying the application without forwarding it to the Advisor. *Ibid.* Finding "no evidence to justify overturning the supervisor's finding that [petitioner did] not possess the high degree of integrity and sound judgment required to be an FAA DER," the Appeal Panel issued a final decision affirming denial of petitioner's DER application. *Id.* at 39; see Pet. App. 11a-12a.

c. Petitioner opted not to file a petition for review in the court of appeals pursuant to 49 U.S.C. 46110. Instead, five months after the decision, petitioner filed suit in district court under Title VII and 42 U.S.C. 1981. Pet. App. 2a, 12a. Petitioner alleged that, by denying

his application to be certified as a DER, the Secretary of Transportation (Secretary) violated Title VII by discriminating against him based on race, and by retaliating against him for previous charges of discrimination he filed while employed by the FAA. *Id.* at 44a-48a. He also alleged that the denial of his DER application violated 42 U.S.C. 1981. Pet. App. 2a, 12a.

The government moved to dismiss petitioner's complaint for lack of subject matter jurisdiction and failure to state a claim, and, alternatively, for summary judgment. Pet. App. 9a. The district court granted the government's motion to dismiss, concluding that petitioner's suit constituted "an impermissible collateral attack on the FAA's order denying his application for a DER appointment." *Id.* at 13a. The court held that it lacked jurisdiction to review the FAA's order because the Aviation Act gives appellate courts "exclusive jurisdiction to review FAA orders." *Id.* at 14a. The court relied on several courts of appeals decisions refusing to consider constitutional tort claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that were "'inescapably intertwined' with a review of the procedures and merits" of FAA orders appealable under Section 46110. Pet. App. 14a-15a (citing, *e.g.*, *Merritt* v. *Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999) (*Merritt I*); *Tur* v. *FAA*, 104 F.3d 290 (9th Cir. 1997); *Green* v. *Brantley*, 981 F.2d 514 (11th Cir. 1993)). The court also noted that it would likely "grant * * * summary judgment as to all of [petitioner's] claims and causes of action, were the court to determine it holds jurisdiction over those claims." *Id.* at 17a.

d. Petitioner appealed. On appeal, the government withdrew reliance on the jurisdictional argument. In its brief, the government argued that this Court and the

court of appeals had long established that Title VII "'provides the exclusive judicial remedy for claims of discrimination in federal employment'" and "entitles a federal employee to *de novo* review of discrimination claims by a trier of fact." Gov't C.A. Br. 21 (quoting *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and citing *Chandler* v. *Roudebush*, 425 U.S. 840, 864 (1976)). The government argued that this position was consistent with the Fifth Circuit's precedents, including cases in which the court had declined to extend the judicially created *Bivens* remedy to cases challenging FAA aviation orders. *Id.* at 25-26. The government explained that the logic of *Bivens* cases does not control when a plaintiff files suit under Title VII because in Title VII cases Congress has expressly authorized an exclusive cause of action to remedy the alleged discrimination. *Ibid.*

Although the government acknowledged that it had "modified" its "prior view on subject matter jurisdiction," it argued the change was a "narrow" one that did not require a reversal or remand. Gov't C.A. Br. 22. The government argued that the district court's dismissal of petitioner's Section 1981 claim could be affirmed on the alternative ground that that provision does not provide a remedy against the United States. *Id.* at 40-42. The government further argued that the court's dismissal of petitioner's Title VII race discrimination claim could be affirmed on the alternative ground that, because DERs are not employees of the FAA, neither DERs nor individuals applying for certification as DERs are covered by Title VII. *Id.* at 27-30. In addition, the government argued that petitioner's post-employment retaliation claim could be resolved on the alternative ground that the Secretary had legitimate non-

retaliatory reasons for denying petitioner's DER application. *Id.* at 30-40.

The government also noted that, even if petitioner were to succeed on any of his claims, the district court could award only limited relief. Gov't C.A. Br. 23-25. As the government explained, the Aviation Act gives courts of appeals "*exclusive* jurisdiction to affirm, amend, modify, or set aside any part of the order" at issue. *Id.* at 23 (quoting 49 U.S.C. 46110(c)). As a result, a district court would be powerless to modify or reverse an FAA order that was challenged in a discrimination case; if a court found that discrimination had occurred, it could only afford a plaintiff limited relief, such as an order requiring the FAA to consider a new DER application in a discrimination-free process.

e. Notwithstanding the government's submission, the court of appeals affirmed the district court's dismissal for lack of jurisdiction. Pet. App. 3a-5a. The court found that this case was controlled by its recent decision in *Ligon* v. *LaHood*, 614 F.3d 150 (5th Cir. 2010), petition for cert. pending, No. 10-1185 (filed Jan. 12, 2011), which held that the district court lacked jurisdiction over an age discrimination claim by a DER who wished to challenge the Administrator's decision to revoke some of his areas of delegated authority. As in *Ligon*, the court here found that petitioner's discrimination suit was "'inescapably intertwined' with a challenge to the procedures and merits" of a final order of the Administrator—an order that is reviewable only under the Aviation Act. Pet. App. 4a. Resolving petitioner's claims would "necessarily require[] a review and balancing of the same evidence that the FAA had weighed" in reaching the challenged decision. *Id.* at 5a.

DISCUSSION

Petitioner challenges the court of appeals' holding that the Aviation Act, 49 U.S.C. 46110(a), divests the district court of jurisdiction over petitioner's claim under Title VII. Although the government agrees with petitioner that the court of appeals' jurisdictional holding was incorrect, review of that decision is not warranted in this case, both because the court of appeals' decision does not conflict with any decision of any other court of appeals and because a contrary jurisdictional ruling would not affect the outcome of this case.

1. As the government explained in its brief in the court of appeals, the district court had subject matter jurisdiction over petitioner's discrimination and retaliation claims. This Court has held that the anti-discrimination provision of Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and entitles a federal employee to de novo review of discrimination claims by a trier of fact, *Chandler* v. *Roudebush*, 425 U.S. 840, 864 (1976). The Aviation Act provides that a person seeking review of most final FAA orders may seek review only in the federal courts of appeals. 49 U.S.C. 46110(a). Such review is not a substitute for Title VII and does not preclude a proper Title VII plaintiff from pursuing his claims of employment discrimination. When a DER applicant files a petition for review under the Aviation Act, a court of appeals reviews the administrative record concerning the certification application process. Unless an applicant raised his discrimination or retaliation claim in his administrative appeal, such a claim cannot be adjudicated in an action under the Aviation Act seeking review in the court of appeals of the challenged agency action.

See 49 U.S.C. 46110(d) (limiting appellate review to only those issues raised in the administrative proceeding). Moreover, under the plain language of the Aviation Act and long-settled principles of administrative law, appellate courts may not conduct de novo review of an order denying a DER certification. Rather, the Administrator's factual findings must be affirmed if supported by substantial evidence, 49 U.S.C. 46110(c), and the agency's ultimate determination must be upheld unless it was arbitrary or capricious.[3]

The Fifth Circuit in *Ligon* v. *LaHood*, 614 F.3d 150 (2010), petition for cert. pending, No. 10-1185 (filed Jan. 12, 2011), erred in relying on cases holding that courts should not provide a remedy under *Bivens* for individuals seeking to challenge FAA orders that are otherwise reviewable in the courts of appeals pursuant to 49 U.S.C. 46110(a). 614 F.3d at 155-156. The courts in those cases adhered to this Court's admonition that *Bivens* should not be extended into a new context when there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). Here, the availability of the administrative appeal process and judicial review under the Aviation Act presents ample reason to hesitate before creating a new judicially inferred cause of action. By contrast to *Bivens*, Title VII creates an express—and

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[3] Although the Aviation Act is silent on the standard of review applicable to non-factual findings, the courts of appeals have applied the Administrative Procedure Act's deferential standard of review, see 5 U.S.C. 706, to such determinations. See, *e.g.*, *City of Santa Monica* v. *FAA*, 631 F.3d 550, 554 (D.C. Cir. 2011), *City of Pittsfield* v. *EPA*, 614 F.3d 7, 14 (1st Cir. 2010); *Menard* v. *FAA*, 548 F.3d 353, 357 (5th Cir. 2008); *Flamingo Express, Inc* v. *FAA*, 536 F.3d 561, 567 (6th Cir. 2008); *Newton* v. *FAA*, 457 F.3d 1133, 1136 (10th Cir. 2006).

exclusive, see *Brown*, 425 U.S. at 835— cause of action for discrimination claims alleged by federal employees.

2. Although the court of appeals erred in concluding the district court lacked jurisdiction, this Court's intervention is not warranted in this case, both because the court's decision does not squarely conflict with the decisions of other courts of appeals and because a contrary ruling on the jurisdictional question would have no effect on the outcome of this case.

a. First, contrary to petitioner's assertion (Pet. 6-7), there is no division among the courts of appeals about the question presented that would warrant this Court's intervention in this case.

Petitioner relies on the D.C. Circuit's decision in *Battle* v. *FAA*, 393 F.3d 1330 (2005), which, he argues (Pet. 6), held that "reinstatement and back-pay claims for race and disability discrimination—including those under Title VII—are not the kinds of claims that invoke the exclusive-jurisdiction provision of § 46110." That is incorrect. The plaintiff in *Battle* filed suit in federal district court challenging the FAA's decision to terminate an arbitration process regarding discrimination claims plaintiff had brought against the FAA. 393 F.3d at 1332-1333. In concluding that the district court had jurisdiction over the plaintiff's claims, the court of appeals held that the decision being challenged—the decision to terminate the arbitration process—was not "an order issued by * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator" and was not, therefore, governed by Section 46110. *Id.* at 1334. In this case, in contrast, there is no question that the order denying petitioner's application to be certified as a DER is governed by Section 46110.

See Pet. App. 4a. Although the government agrees that the district court had jurisdiction over petitioner's claims, the court of appeals' holding to the contrary does not conflict with the D.C. Circuit's decision in *Battle*.

Petitioner also relies (Pet. 6-7) on two court of appeals cases involving suits under the Federal Tort Claims Act, rather than claims of employment discrimination. In both *Merritt* v. *Shuttle, Inc.*, 245 F.3d 182 (2d Cir. 2001) (*Merritt II*), and *Beins* v. *United States*, 695 F.2d 591 (D.C. Cir. 1982), the courts of appeals held that the district courts had jurisdiction over the allegations of tortious conduct because such allegations were not intertwined with any FAA order reviewable under the Aviation Act. See *Merritt II*, 245 F.3d at 189-190 ("Merritt's FTCA claim does not allege that he was injured or aggrieved by the * * * order suspending his pilot's certificate," but rather "that he was injured by the failure of FAA employees to provide him with accurate weather information prior to takeoff."); *Beins*, 695 F.2d at 598 n.11 (an appeal of an FAA order under the Aviation Act "would not have led to review of the negligence issue before the district court").

The Second Circuit employed similar reasoning in *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635, 642 (1985), abrogated on other grounds by *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (see Pet. 7), in concluding that a district court had jurisdiction over an Age Discrimination in Employment Act (ADEA) ADEA suit relating to a final FAA order that was reviewable directly in the courts of appeals pursuant to Section 46110. That court concluded that district courts had jurisdiction over airline employees' ADEA claims challenging a seniority list that was created as part of an airline merger and approved by the FAA's

Civil Aeronautics Board (CAB), even though the CAB's approval of the list also could have been appealed to the circuit court under the Aviation Act. To the extent the issue in *Cook* overlaps with the issue in this case, the two courts of appeals applied consistent reasoning. In *Cook*, the Second Circuit found that the district court had jurisdiction over the ADEA claims because the administrative agency was not authorized to decide the issues raised in the separate ADEA action. 771 F.2d at 641-642. The court therefore concluded that the ADEA claims did not constitute a "collateral attack" on the CAB's approval of the seniority list. *Id* at 643.

The court of appeals in this case held that the district court did not have jurisdiction over petitioner's Title VII claims because they were "inescapably intertwined" with the merits of the agency's final action denying petitioner's application to be certified as a DER. Pet. App. 4a. The court relied on its recent decision in *Ligon*, in which it had also held that, to the extent a plaintiff in petitioner's position raises a claim that "could not have been raised in a challenge to a particular order," a district court would have jurisdiction to consider it. See *Ligon*, 614 F.3d at 157 n.2; see also Pet. App. 16a n.6 (district court's conclusion that, to the extent petitioner's allegations are not inescapably intertwined with the agency's decision on his DER application, "those allegations fail to rise to the level of an adverse employment action necessary" to state a claim of discrimination or retaliation under Title VII). That decision creates no conflict with the decisions of other courts of appeals that would warrant this Court's review.[4]

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[4] Petitioner also relies (Pet. 6) on the district court's decision in *Breen* v. *Peters*, 474 F. Supp. 2d 1 (D.D.C. 2007). The district court in that case stated that "[c]ertain FAA administrative orders are review-

Moreover, the question whether district courts have jurisdiction over employment discrimination claims brought by FAA designees is unlikely to arise with any significant frequency. As discussed at pp. 17-18, *infra*, most such suits are subject to dismissal for failure to state a claim because designees are neither "employees" of nor "applicants for employment" with the FAA.[5] It is not clear in any event why an FAA designee would pursue such a claim under the ADEA or Title VII, since the only remedies available to him are equally available under the Aviation Act. The Aviation Act gives the courts of appeals "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order" challenged. 49 U.S.C. 46110(c). A district court therefore cannot order the FAA to grant a disappointed applicant the primary relief he is likely to seek—DER authority. See *Ligon*, 614 F.3d at 157 ("[T]he relief Ligon seeks—reinstatement of his areas of authority—cannot be granted by a district court reviewing an ADEA claim."). Nor could a court award a DER applicant backpay, because air designees are either independent contractors or full-time private employees, and in either instance are paid directly by a private-sector entity. *Id.* at 152. The only

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able only by the court of appeals," and that "claims that are '"inescapably intertwined" with review of such orders' do not fall within a district court's jurisdiction." *Id.* at 4 (citations omitted). The district court concluded that the ADEA claim of the FAA employee in that case was not inescapably intertwined with the FAA's decision to outsource certain flight service activities to private entities in part because the employee did not have an opportunity to raise an age discrimination claim in his administrative appeal. *Id.* at 6. That reasoning is consistent with the court of appeals' reasoning in this case.

[5] In some cases, an applicant who is a former FAA employee may be able to state a post-employment retaliation claim under the ADEA or Title VII. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997).

types of relief a DER applicant could obtain in a Title VII suit would be a finding of discrimination, an order requiring the FAA to consider a new DER application in a discrimination-free process, and possibly attorney's fees under the Equal Access to Justice Act.

b. This case would not be a suitable candidate for review in any event, since, as the district court indicated in its decision (Pet. App. 17a), petitioner's Title VII and Section 1981 claims all fail for independent reasons.

Petitioner's discrimination claim under Title VII fails because DERs are not employees of the FAA; DERs and applicants to become DERs and are not, therefore, covered by Title VII. DERs are skilled independent contractors who, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." FAA Order 8100.8C § 300(f). DERs are not permitted to perform certain "inherently governmental functions" that "cannot be delegated to a designee." *Id.* § 300(c). Moreover, the FAA does not set DERs' work schedules, does not actively supervise the work performed by DERs, and does not provide them with any equipment or office space. See Gov't C.A. Br. 29. Designees collect no salary or benefits from the FAA. Gov't C.A. Br. 29. Instead, they are paid by private aviation companies. *Ibid.* In fact, some DERs are full-time employees of private companies. *Ibid.*; FAA Order 8100.8C § 307 (discussing "Company DER" certification). And if a current FAA employee wishes to become a designee, he must resign from the FAA before obtaining DER certification. *Id.* § 402.

Petitioner's Title VII post-employment retaliation claim fares no better. Even assuming that petitioner could make out a prima facie case of post-employment

retaliation under Title VII, cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), his claim would fail because no reasonable fact finder could conclude that the Administrator's stated reasons for denying the application were pretextual. The FAA explained that it denied petitioner's DER application in light of five specific events demonstrating that he did not "possess a high degree of integrity, sound judgment, and a cooperative attitude": (1) while an FAA employee, petitioner submitted a resume to a company for which he had FAA oversight responsibility; (2) petitioner requested that a prior manager remove disciplinary actions from petitioner's file; (3) petitioner performed poorly as a trainer at the FAA Academy, leading to a request that he not return as an instructor; (4) petitioner misused his government credit card; and (5) petitioner circulated business cards that falsely indicated he had already been certified as a DER. Gov't C.A. R.E. 31-32. Each stated reason provides a sufficient and independent basis for concluding that petitioner lacked the integrity and judgment necessary to become a DER. See FAA Order 8100.8C § 401(c) ("[f]ailure to meet the applicable criteria will result in a denial" of the application).

Petitioner has never disputed the accuracy of any of the reasons given for denial of his application. He argues instead that the FAA failed to follow its own procedures (Pet. 2), and that some of the information referenced above should have been "expunged" from his personnel record under a settlement he reached with the agency (Pet. 3). He is incorrect.[6] In any case, even if

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[6] The Appeal Panel expressly rejected petitioner's challenge to the procedures employed by the FAA, correctly concluding that the procedures were "appropriate concerning the circumstances." Gov't C.A. R.E. 38. Equally unavailing is petitioner's argument (Pet. 3) that the

the FAA were forbidden from considering petitioner's conduct while an FAA employee, it would still be permitted to take note of the fact that, at the time of his DER application, he was circulating business cards that falsely indicated that he had already received a DER certification. Gov't C.A. R.E. 40 (sample business card). Such a misrepresentation alone would provide sufficient grounds for the Administrator's conclusion that petitioner lacked the requisite integrity and judgment to become a safety designee. See FAA Order 8100.8C § 400(a) ("Any false statements made by the applicant in the application package are grounds for denial of appointment.").

Finally, although petitioner's question presented focuses specifically on his Title VII claims (see Pet. i), his Section 1981 claim also lacks merit. That statute protects petitioner's rights only "against impairment by *nongovernmental* discrimination and impairment under color of *State* law." 42 U.S.C. 1981(c) (emphases added). Every court of appeals to consider the question has held that Section 1981 does not reach discrimination (such as

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terms of his prior settlement forbid the FAA from considering his poor performance as an employee in determining whether to certify him as a designee of the Administrator. The settlement agreement merely required the FAA to "remove from [petitioner's] O[fficial] P[ersonnel] F[older] any documentation regarding any disciplinary action (including, but not limited to, any suspension or letter(s) of reprimand) which might currently exist in his OPF." Gov't C.A. R.E. 28. By its plain terms, this agreement was limited to documentation in petitioner's OPF; it did not extend to other file systems, such as the Employee Performance File (EPF) accessed by the Appointing Office Manager reviewing petitioner's DER application. *Id.* at 26 (Harrison Decl. ¶10). By regulation, the EPF and OPF are distinct systems, see 5 C.F.R. 293.402, and the FAA did not agree to expunge records from that separate EPF system.

is alleged here) perpetrated under color of federal law. See, *e.g.*, *Dotson* v. *Griesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Davis-Warren Auctioneers* v. *FDIC*, 215 F.3d 1159, 1161 (10th Cir. 2000); *Davis* v. *DOJ*, 204 F.3d 723, 725 (7th Cir. 2000); *Lee* v. *Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998). Petitioner does not acknowledge those holdings or advance any plausible basis for asserting a Section 1981 claim against the Secretary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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